(9)

No. 06-8120
Title: Bruce Edward Brendlin, Petitioner
v.
California
Docketed: December 4, 2006
Lower Ct: Supreme Court of California
Case Nos.: (S123133)
Decision Date: June 29, 2006
Rehearing Denied: August 30, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 28 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 3, 2007)
Dec 18 2006	Waiver of right of respondent California to respond filed.
Dec 28 2006	DISTRIBUTED for Conference of January 12, 2007.
Jan 8 2007	Response Requested . (Due February 7, 2007)
Jan 12 2007	Brief of respondent California in opposition filed.
Jan 16 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 16 2007	Reply of petitioner Bruce Edward Brendlin filed. (Distributed)
Jan 19 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 30 2007	Motion to appoint counsel filed by petitioner Bruce Edward Brendlin.
Feb 5 2007	SET FOR ARGUMENT ON Monday, April 23, 2007.
Feb 14 2007	Motion DISTRIBUTED for Conference of March 2, 2007.
Feb 21 2007	Record received from Supreme Court of California. (1 box)
Mar 5 2007	Motion to appoint counsel filed by petitioner GRANTED. Elizabeth M. Campbell, Esq., of Sacramento, California is appointed to serve as counsel for the petitioner in this case.
Mar 5 2007	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 5 2007	Brief of petitioner Bruce Edward Brendlin filed.
Mar 5 2007	Joint appendix filed.
Mar 5 2007	Brief amici curiae of American Civil Liberties Union, et al. filed.
Mar 21 2007	CIRCULATED.
Apr 3 2007	Brief amicus curiae of Wayne County, Michigan filed. (Distributed)
Apr 9 2007	Brief of respondent California filed. (Distributed)
Apr 11 2007	Statement of costs for printing received.
Apr 16 2007	Reply of petitioner Bruce Edward Brendlin filed. (Distributed).
Apr 23 2007	Argued. For petitioner: Elizabeth M. Campbell, Sacramento, Cal. (Appointed by this Court.) For respondent: Clifford E. Zall, Deputy Attorney General, Sacramento, Cal.

34 ORIGINAL

10

No. 06-8120

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

Supreme Court, U.S.
FILED
NOV 28 2006
OFFICE OF THE CLERK

On Petition for Writ of Certiorari

To the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND
Executive Director
ELIZABETH CAMPBELL
Staff Attorney
2407 J Street, Suite 301
Sacramento, CA 95816
(916)441-3792

Attorneys for Petitioner

RECEIVED
DEC - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Supreme Court included the State of California and petitioner Bruce Edward Brendlin. There are no parties to the proceedings other than those named in the petition.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS TO GRANT THE PETITION 7

Certiorari Is Appropriate in Order to Resolve the Split of Authority Between the California Supreme Court and Other State and Federal Courts as to Whether a Passenger Is Detained by Virtue of a Traffic Stop 7

A. Introduction 7

B. The Decision of the California Supreme Court is at Odds with This Court's Holdings 7

C. The Decision of the California Supreme Court Is at Odds with the Holdings of Those Federal Circuits That Have Considered the Issue of Whether a Passenger May Challenge an Unlawful Traffic Stop 18

D. The Decision of the California Supreme Court Is at Odds with the Holdings of Most Other State Courts to Have Considered the Issue 25

CONCLUSION 32

INDEX TO APPENDICES

A.	Opinion of the California Supreme Court filed June 29, 2006	33
B.	Order of the California Supreme Court Denying Rehearing filed August 30, 2006	62
C.	Opinion of the California Court of Appeal, Third Appellate District, filed January 27, 2004	64
D.	Transcript of Hearing on Petitioner's Motion to Suppress	77

TABLE OF AUTHORITIES

	Page
Constitutional Provisions	
United States Constitution, Amendment IV	3, 5, 7-9, 13, 14, 17, 18
United States Constitution, Amendment V	14
United States Constitution, Amendment XIV § 1	3, 14
Cases	
Arnold v. Commonwealth, 437 S.E.2d 235(Va.App. 1993)	26
Berkemer v. McCarty, 468 U.S. 420 (1984)	10,11, 13, 30
Brower v. County of Inyo, 489 U.S. 593 (1989)	15, 16
California v. Hodari D., 499 U.S. 621 (1991)	10, 16
Colorado v. Bannister, 449 U.S. 1 (1980)	9
County of Sacramento v. Lewis, 523 U.S. 833 (1998)	14, 15
Delaware v. Prouse, 440 U.S. 648 (1979)	9, 13
Dunaway v. New York, 422 U.S. 200 (1979)	8
Florida v. Bostick, 501 U.S. 429 (1991)	10-13
Florida v. Royer 460 U.S. 491 (1983)	8
Hill v. California, 401 U.S. 797 (1971)	15, 28
Howard v. State, 888 S.W.2d 166 (Tex.Ct.App.1994)	25
Jarvis v. State, 600 A.2d 38 1 (Del.1991)	27
Kothe v. State, 152 S.W.3d 54 (Tex. 2004)	26
Maryland v. Garrison, 480 U.S. 79 (1987)	15
Maryland v. Wilson, 519 U.S. 408 (1997)	27, 29, 30
McKnight v. State, 612 N.E.2d 586 (Ind.Ct.App.1993)	26

TABLE OF AUTHORITIES

	Page
Cases	
Mich. Dep't of State Police v. Sitz 496 U.S. 444 (1990)	17
Ohio v. Robinette, 519 U.S. 33 (1996)	10
Parkhurst v. State, 628 P.2d 1369 (Wyo. 1981)	27
Pennsylvania v. Mimms 434 U.S. 106 (1977)	27
People v. Brendlin, 115 Cal.App.4th 206 (2004)	2, 5, 6
People v. Brendlin, 38 Cal.4th 1107 (2006)	2, 6, 10-13, 15, 16, 18, 30
People v. Bunch, 764 N.E.2d 1189 (Ill.App. 2002)	25
People v. Cartwright, 72 Cal.App.4th 1362 (1999)	27, 28, 30
People v. H. J., 931 P.2d 1177 (Colo. 1997)	29
People v. Jackson, 39 P.3d 1174 (Colo. 2002)	7, 27-29
People v. Kunath, 425 N.E.2d 486 (Ill.App. 1981)	26
People v. Lagrone, 464 N.E.2d 712 (Ill.App. 1984)	26
People v. Manke, 537 N.E.2d 13 (Ill.App. 1989)	27
People v. Millan, 508 N.E.2d 903 (N.Y. 1987)	27
Rakas v. Illinois, 439 U.S. 128 (1978)	9, 12, 20
Scott v. State, 877 P.2d 503 (Nev. 1994)	26
State v. Becker, 458 N.W.2d 604 (Iowa 1990)	27
State v. Bowers, 976 S.W.2d 379 (Ark. 1998)	25
State v. Carter, 630 N.E.2d 355 (Ohio 1994)	25
State v. Cooper, 579 S.E.2d 754 (Ga. 2003	26
State v. Creech, 806 P.2d 1080 (N.M. App. 1991)	26

TABLE OF AUTHORITIES

	Page
Cases	
State v. DeMasi, 419 A.2d 285 (R.I. 1980)	26
State v. Eis, 348 N.W.2d 224 (Iowa 1984)	26
State v. Epperson, 703 P.2d 761 (Kan. 1985)	26
State v. Gomez, 6 P.3d 765 (Ariz. App. 2000)	25
State v. Harms, 449 N.W.2d 1 (Neb. 1989)	26
State v. Harris, 557 N.W.2d 245 (Wis. 1996)	25
State v. Haworth, 679 P.2d 1123 (Id. 1984)	26
State v. Hickman, 763 A.2d 330 (N.J. 2001)	26
State v. Higgins, 884 P.2d 1242 (Utah 1994)	25
State v. Johnson, 589 N.W.2d 108 (Neb. 1999)	26
State v. Krebs, 504 N.W.2d 580 (S.D. 1993)	26
State v. Malone, 683 N.W.2d 1 (Wis. 2004)	26
State v. Mendez, 970 P.2d 722 (Wash. 1999)	7, 27, 30
State v. Ryan, 788 P.2d 1327 (Id. 1990)	26
State v. Stott, 503 N.W.2d 822 (Neb. 1993)	25
State v. Wilson, 678 N.W.2d 176 (S.D. 2004)	26
State v. Wilson, 867 P.2d 1175 (N.M. 1994)	25
Tennessee v. Garner, 471 U.S. 1 (1985)	8
Terry v. Ohio, 392 U.S. 1 (1968)	8, 11, 12
United States v. Ameling, 328 F.3d 443 (8th Cir. 2003)	19
United States v. Brown, 102 F.3d 1390 (5th Cir.1996)	19

TABLE OF AUTHORITIES

	Page
Cases	
United States v. Colin, 314 F.3d 439 (9th Cir. 2002)	23
United States v. DeLuca, 269 F.3d 1128 (10th Cir. 2001)	19, 21
United States v. Durant, 730 F.2d 1180 (8th Cir.1984)	19
United States v. Erwin, 875 F.2d 268 (10th Cir. 1989)	19
United States v. Eylicio-Montoya, 70 F.3d 1158 (10th Cir. 1995)	19
United States v. Faulkner, 450 F.3d 466 (9th Cir. 2006)	8
United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998)	19
United States v. Grant, 349 F.3d 192 (5th Cir. 2003)	19
United States v. Hill, 855 F.2d 664 (10th Cir. 1988)	19
United States v. Kimball, 25 F.3d 1 (1st Cir. 1994)	19, 23
United States v. Mendenhall, 446 U.S. 544 (1980)	8
United States v. Mosley, 454 F.3d 249 (3rd Cir. 2006).	7, 19-23
United States v. Powell, 929 F.2d 1190 (7th Cir. 1991)	19, 24, 25
United States v. Roberson, 6 F.3d 1088 (5th Cir. 1993)	19, 24
United States v. Rusher, 966 F.2d 868 (4th Cir. 1992)	19
United States v. Twilley, 222 F.3d 1092 (9th Cir. 2000)	19, 23
United States v. Williams, 589 F.2d 210 (5th Cir.1979)	19
Whren v. United States, 517 U.S. 806 (1996)	10,12, 20, 30
Wong Sun v. United States, 371 U.S. 471 (1963)	20

TABLE OF AUTHORITIES

	Page
Statutes and Rules	
California Health and Safety Code	
section 11370.2, subdivision (b)	4
section 11377, subdivision (a)	4
section 11379, subdivision (a)	4
section 11379.6	4, 5
California Penal Code	
section 667.5, subdivision (b)	5
section 1538.5	5
section 1538.5, subdivision (m)	5
United States Codes	
28 U.S.C. section 1257, subdivision (a)	2
42 U.S.C.S. section 1983	14
Other Authorities	
6 Wayne R. LaFave, Search and Seizure § 11.3 (4th ed. 2004)	19

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari

To the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioner, Bruce Edward Brendlin, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Supreme Court filed on June 29, 2006.

OPINIONS BELOW

The opinion of the California Supreme Court to which this petition relates was filed on June 29, 2006, and is attached as Appendix A. It is reported at *People v. Brendlin*, 38 Cal.4th 1107, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006). The California Supreme Court's one-page order denying rehearing was filed on August 30, 2006, and is attached hereto as Appendix B. The opinion of the Court of Appeal of the State of California, Third Appellate District, is attached hereto as Appendix C, and is reported at *People v. Brendlin*, 115 Cal.App.4th 206, 8 Cal. Rptr. 3d 882 (2004). The transcript of the trial court hearing on petitioner's motion to suppress is attached hereto as Appendix D.

JURISDICTION

The decision of the California Supreme Court to be reviewed was filed on June 29, 2006. Petitioner filed a timely Petition for Rehearing on July 10, 2006. The California Supreme Court denied the Petition for Rehearing on August 30, 2006. This petition is filed within 90 days of that date. Rule 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. XIV § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 27, 2001, Robert Brokenbrough, a deputy with the Sutter County Sheriff's Department, spotted a vehicle with expired registration tags. In the rear window, the car displayed a red temporary operating permit from the California Department of Motor Vehicles; the sticker had the number eleven on it, indicating that it was valid for the month of November. Deputy Brokenbrough believed that it was not lawful for the car to be operated with only a temporary operating permit. The deputy contacted sheriff's dispatch and verified that the plate was expired, but that an application was in process for renewal of the registration. RT 12-14, 42-43.

Deputy Brokenbrough activated his lights and made a traffic stop in order to verify that the sticker on the car's window was the one issued for that license number. The driver of the car was Karen Simeroth, and Bruce Brendlin was in the passenger seat. After he stopped the car, Deputy Brokenbrough recognized Mr. Brendlin, who also verbally identified himself at the deputy's request. Deputy Brokenbrough knew that either Mr. Brendlin or his brother was a parolee at large, so he contacted dispatch and eventually received word that Mr. Brendlin was wanted for a parole violation. The deputy then ordered Mr. Brendlin out of the car at gunpoint and placed him under arrest. A search incident to Mr. Brendlin's arrest turned up an orange syringe cap on his person, and items related to drug manufacturing in the car. RT 12-19, 26-38, 43.

On December 21, 2001, the district attorney of Sutter County, California, filed an information in Superior Court charging Mr. Brendlin and Ms. Simeroth[1] with manufacturing methamphetamine (Health & Saf. Code § 11379.6)[2], transporting methamphetamine (Health & Saf. Code § 11379, subd. (a)), and possessing methamphetamine (Health & Saf. Code § 11377, subd. (a)) on November 27, 2001. As to Mr. Brendlin alone, the information alleged two prior convictions under Health and Safety Code section 11370.2, subdivision (b). CT 35-37.

---

[1]Ms. Simeroth was not a party to the appeal.

[2]All references to the Health and Safety Code, the Vehicle Code, or the Penal Code are to the code of the State of California unless otherwise specified.

On January 25, 2002, Mr. Brendlin moved to suppress unlawfully seized evidence under Penal Code section 1538.5 and the Fourth Amendment to the United States Constitution, alleging that he was unlawfully detained because the officer had no reasonable suspicion to justify the traffic stop, and requesting suppression of items seized from his person as well as from the car. Following a hearing on February 8, 2002, the superior court denied that motion, finding that the traffic stop was not unreasonable, that Mr. Brendlin was not detained by virtue of the traffic stop because he was free to leave once the car was stopped, and that Mr. Brendlin lacked "standing" to bring a motion to suppress the items found in the car. CT 42, 47, 85, RT 70.

On February 11, 2002, Mr. Brendlin pled guilty to a violation of Health and Safety Code section 11379.6, subdivision (a), and admitted an amended allegation that he had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). The prosecution moved to dismiss the remaining counts and allegations, and the parties agreed that Mr. Brendlin would serve a term of four years in state prison, concurrent to any parole violation. Mr. Brendlin was sentenced in accordance with the plea agreement. CT 88.

On March 15, 2002, Mr. Brendlin filed timely notice of appeal under Penal Code section 1538.5, subdivision (m). On January 27, 2004, the Court of Appeal of the State of California, Third Appellate District, issued an opinion reversing the denial of Mr. Brendlin's motion to suppress. *People v. Brendlin*, 115 Cal.App.4th 206, 8 Cal. Rptr. 3d

882 (2004). The Court of Appeal held that Mr. Brendlin was entitled to challenge the legality of the traffic stop, that the stop was undertaken without reasonable suspicion, and that the evidence seized from Mr. Brendlin's person and from the car should have been suppressed as fruits of the illegal traffic stop. *Id.* at pp. 210-211, 8 Cal.Rptr. at p. 885.

The California Supreme Court granted the California Attorney General's petition for review on April 14, 2004. In that court, the prosecution conceded that the traffic stop was not supported by reasonable suspicion, but instead focused on whether Mr. Brendlin, as a passenger, was detained by virtue of the traffic stop. *People v. Brendlin*, 38 Cal.4th 1107, 1114, 136 P.3d 845, 848, 45 Cal.Rptr.3d 50, 54 (2006). On June 26, 2006, the California Supreme Court reversed the lower court opinion, holding that when an officer makes an illegal stop of a automobile, the resulting Fourth Amendment violation may be asserted only by the driver of the vehicle, not by any passenger, because a passenger is not "seized" in the absence of any indication by the officer that the passenger is the subject of the officer's investigation or show of authority. *People v. Brendlin*, *supra*, 38 Cal.4th at 1123, 136 P.3d at 854, 45 Cal.Rptr.3d at 62. A petition for rehearing was denied on August 30, 2006.

REASONS TO GRANT THE PETITION

CERTIORARI IS APPROPRIATE IN ORDER TO RESOLVE THE SPLIT OF AUTHORITY BETWEEN THE CALIFORNIA SUPREME COURT AND OTHER STATE AND FEDERAL COURTS AS TO WHETHER A PASSENGER IS DETAINED BY VIRTUE OF A TRAFFIC STOP

A. Introduction

In its opinion affirming the denial of Mr. Brendlin's motion to suppress, a bare majority of the California Supreme Court has joined the high courts of Colorado and Washington in holding that a passenger's Fourth Amendment rights are not implicated by an unlawful traffic stop. *People v. Brendlin*, 38 Cal.4th 1107, 1115, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006); *see also People v. Jackson*, 39 P.3d 1174 (Colo. 2002) and *State v. Mendez*, 970 P.2d 722 (Wash. 1999). In order to reach this conclusion, the California Supreme Court has crafted a definition of "seizure" that is not consistent with this Court's holdings. Moreover, the California decision departs from the overwhelming weight of state and federal authorities, including a thorough and well-reasoned opinion issued by the Third Circuit one month after the California Supreme Court issued its opinion in the instant case. *United States v. Mosley*, 454 F.3d 249 (3rd Cir. 2006).

The nearly simultaneous issuance of the opinions in *Brendlin* and *Mosley*, and the utter irreconcilability of the conclusions reached by the respective courts, sets up a split of authority that can only be resolved by this court's intervention. This Court should grant this petition in order to resolve that split.

B. The Decision of the California Supreme Court is at Odds with this Court's Holdings

Although this Court has never had occasion to directly rule on the issue of whether a passenger may challenge the fruits of an unlawful traffic stop, the majority of the courts that have considered the issue have interpreted this Court's hints on the subject as tacit endorsement of the position that a passenger's Fourth Amendment rights are implicated by a traffic stop. This view is consistent with this Court's holdings regarding what constitutes a seizure and what police actions implicate Fourth Amendment rights.

In *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Court held that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Id.*, 471 U.S. at 7; *see also United States v. Faulkner*, 450 F.3d 466, 475 (9th Cir. 2006). Even a slight detention is a seizure for Fourth Amendment purposes regardless of whether it amounts to an actual arrest. *Dunaway v. New York*, 422 U.S. 200, 207-209, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Terry v. Ohio*, 392 U.S. 1, 32-33, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Terry* defined a detention as follows: "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, *supra*, 392 U.S. at 19, n. 16. The standard is an objective one: a detention occurs when a reasonable person would not believe he was free to end his encounter with the police. *Florida v. Royer* 460 U.S. 491, 501-502, 103 S.Ct. 1319, 75 L.Ed. 229 (1983), *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Thus, the question – which this court has not directly addressed – is whether a reasonable person would feel free to leave during a traffic stop of a car in which that person is a passenger, or whether a traffic stop in some restrains a passenger's liberty. Put another way, the issue of whether the passenger may challenge an unreasonable traffic stop comes down to the question of whether the passenger's Fourth Amendment rights have been implicated by that traffic stop. *See Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).[3]

To the extent that this Court has addressed the issue in dicta, that dicta has strongly hinted that a passenger is detained by virtue of a traffic stop. In *Colorado v. Bannister,* 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980), the Court stated in a footnote: "There can be no question that the stopping of a vehicle and the detention of its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment." *Bannister,* 449 U.S. at 4, n. 3. The *Bannister* court in turn cited an earlier decision, *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), which noted that the case implicated Fourth Amendment rights "because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [that amendment], even though the purpose of the stop is limited and the resulting detention quite brief." *Prouse*, 440 U.S. at 653; *cf.*

---

[3]Although this Court held in *Rakas* that passengers could not challenge the search of an automobile in which they claimed no possessory interest, that holding is distinguishable from the case at bar, because in *Rakas* the passengers did not challenge the traffic stop. *Rakas v. Illinois, supra,* 439 U.S. at 130-132.

Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) [noting that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons'"]; *cf. Berkemer v. McCarty*, 468 U.S. 420, 436, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ["It must be acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action' of the driver and passengers, if any, of the detained vehicle"].

The California court found these statements unpersuasive, however, and instead focused on the definition of a "seizure." The California majority declined to adopt the definition of a detention propounded by this Court in *Terry v. Ohio*, calling the *Terry* standard "a *necessary*, but not a *sufficient*, condition for a seizure." *People v. Brendlin, supra,* 38 Cal.4th at 115 (emphasis in original), citing *California v. Hodari D.*, 499 U.S. 621, 628, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Instead, California relied on this court's holdings in *Hodari D.* and *Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389, 401-402 (1991) to craft a three-part definition of a seizure, and in doing so, has departed from this Court's admonitions against bright-line rules in favor of a fact-specific approach to assessing reasonableness in the context of the Fourth Amendment. *See Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996).

The three-part test adopted by the California majority holds that a seizure occurs only "when the police, by the application of physical force or show of authority, seek to

restrain the person's liberty," when "the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter," and when "the person actually submitted to that authority [citation] for reasons not 'independent' of the official show of authority." *People v. Brendlin, supra,* 38 Cal.4th at 1118. While this Court has used variations of each of these factors to define different types seizures, the California Supreme Court erred in adopting these factors as a rigid checklist that must be satisfied before any seizure can be deemed to have occurred. As noted above, this Court has instead consistently applied the totality of the circumstances test to the determination of whether a person is seized under the Fourth Amendment. *Florida v. Bostick, supra,* 501 U.S. at 439. Part of that totality of the circumstances test has included the issue of whether a person's freedom of movement has been curtailed by deliberate police action. *See, e.g., Berkemer v. McCarty, supra,* 468 U.S. 420.

Moreover, the California court takes its three rules out of the context of the cases cited, with some misleading results. For instance, the majority opinion quotes *Terry v. Ohio, supra,* 392 U.S. at 19, n. 16, for the proposition that a seizure occurs only "when the police, by the application of physical force or show of authority, *seek* to restrain the person's liberty." *People v. Brendlin, supra,* 38 Cal.4th at 1118 (emphasis added). The precise language used by the court seems to require that the use of force be directed

specifically at the person seized, but the actual quotation from the *Terry* opinion carries no such implication:

> Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.

Terry v. Ohio, supra, 392 U.S. at 19, n. 16. The California Supreme Court's interpretation of *Terry* injects a subjective requirement that makes the officer's mental state a part of the analysis. This Court expressly rejected such a requirement when it rejected the "target of the investigation" approach in *Rakas v. Illinois, supra,* 439 U.S. at 426-428, and reaffirmed the strictly objective standard in *Whren v. United States, supra*: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States, supra,* 517 U.S. at 813.[4]

Likewise, the California majority cites *Florida v. Bostick* for the proposition that the submission to authority must not be the result of some independent force. *People v. Brendlin, supra,* 38 Cal.4th at 1118. The holding in *Bostick*, however, is inapplicable to the facts of this case, because the facts of that case did not present a situation in which the individual's "freedom of action" had been curtailed in the first place. The passenger in *Bostick* was sitting on a bus that was about to leave the station; the officer's actions in

---

[4]Although this Court did not address the issue in *Whren*, the challenge to the traffic stop in that case was brought by both the passenger and the driver of the vehicle, and the Court analyzed the Fourth Amendment rights of both passenger and driver under an objective standard.

that case did not impede the passenger's movement in any way. Moreover, this Court declined to determine whether or not a seizure had occurred in that case, but merely held that the fact that the encounter occurred on a bus was not dispositive of the issue. *Florida v. Bostick, supra,* 501 U.S. at 438.

The majority opinion in *Brendlin* distinguished this Court's statements in *Berkemer v. McCarty, supra,* 468 U.S. 420, to the effect that a traffic stop curtails the freedom of action of both drivers and passengers by noting that "that *Berkemer*'s observation was made in the context of whether a motorist detained pursuant to a traffic stop was in custody for purposes of the *Fifth* Amendment." *People v. Brendlin, supra,* 38 Cal.4th at 1117 (emphasis in original). But the full quote from *Berkemer* clearly applies to the Fourth Amendment:

> It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. E. g., Ohio Rev. Code Ann. § 4511.02 (1982). Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so. Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] [Amendment], even though the purpose of the stop is limited and the resulting detention quite brief."

Berkemer v. McCarty, supra, 468 U.S. at 435, quoting *Delaware v. Prouse, supra,* 440 U.S. at 653 (internal footnotes omitted, brackets in original). Contrary to the California Supreme Court's assertion, this Court was specifically describing the standard for

determining whether a seizure had occurred under the *Fourth* Amendment; the Court then went on to distinguish the stronger showing necessary to establish that a prisoner was "in custody" for purposes of the *Fifth* Amendment. *Berkemer v. McCarty, supra,* 468 U.S. at 437-438. The California court thus erred in dismissing this Court's observations in *Berkemer* as to what constitutes a Fourth Amendment "seizure."

By contrast, the California court relied heavily on *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), a case which does not address the issue of when a passenger is detained for purposes of the Fourth Amendment, and instead addresses the issue of "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Id.*, 523 U.S. at 836. In *County of Sacramento*, this Court reviewed a civil rights suit filed under 42 U.S.C.S. § 1983 against a law enforcement officer who had struck and injured a passenger who had been riding on a pursued suspect's motorcycle. In finding that the passenger had not been deprived of due process under the Fourteenth Amendment, this court emphasized that the officer had not acted in bad faith: "in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Ibid.*

The California Supreme Court seized upon the somewhat tangential holding in *County of Sacramento* that no Fourth Amendment seizure occurred when the officer struck the passenger with his motorcycle. *People v. Brendlin, supra,* 38 Cal.4th at 1117, citing *County of Sacramento v. Lewis, supra,* 523 U.S. at 844. This Court's holding in *County of Sacramento* did not depend upon the injured person being a passenger rather than the intended target of the stop; rather, the Court simply reiterated the unremarkable conclusion that "no Fourth Amendment seizure would take place where a 'pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit,' but accidentally stopped the suspect by crashing into him." *County of Sacramento v. Lewis, supra,* 523 U.S. at 844, citing *Brower v. County of Inyo,* 489 U.S. 593, 597, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989).

More importantly, the *Brower* case upon which *County of Sacramento* relied undermines the California Supreme Court's conclusions significantly when it states, without qualification, that "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking." *Brower v. County of Inyo, supra,* 489 U.S. at 596, citing *Maryland v. Garrison,* 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) and *Hill v. California,* 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971). The majority opinion in *Brendlin* cites *Brower* in support of the conclusion that an officer's use of force in curtailing an individual's freedom of movement must be "intentionally applied." *People v. Brendlin, supra,* 38 Cal.4th at 1115-1116. The *Brower* opinion, however, in no way

supports the proposition that "intentionally applied" means that the officer intended to stop a particular person: "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place to achieve that result." *Brower v. County of Inyo, supra,* 489 U.S. at 599. The fortuitous detention of a passenger constitutes a seizure under the reasoning of *Brower.*

Nor does this Court's decision in *California v. Hodari D., supra*, compel a different result. The California majority opinion cites *Hodari D.* in support of the proposition that a passenger is not seized by virtue of a traffic stop, because a seizure requires an "actual taking into custody" or a "submission to authority" before a person may be considered to have been "seized" for purposes of the Fourth Amendment, and since it is the driver who submits to the police authority by stopping the car, the passenger can not be said to have been seized. *People v. Brendlin, supra*, 38 Cal.4th at 1121, n. 4, citing *California v. Hodari D., supra,* 499 U.S. at 626-627. *Hodari D.*, however, addressed a very narrow question: whether a suspect who fails to yield to an officer's show of force has been "seized." This court held that the a suspect who continues to flee has not been seized, and did so in the context of a broader examination of various types of government action that may constitute a seizure. *Hodari D., supra*, 499 U.S. at 624-625. However, that discussion addressed the physical seizure of a person by police, and did not address the scenario in which a car and its occupants are seized by the action of an officer making a traffic stop.

Finally, the California Supreme Court lists several hypothetical situations in which it determines that it would be "absurd" to find that a seizure had occurred within the meaning of the Fourth Amendment:

> A police detention of an orderly pushing a wheelchair-bound individual or a detention of a parent pushing a child in a stroller may well incidentally curtail the freedom of action of the passengers who are dependent on those adults. The detention of the orderly or parent will also, to use the dissent's phrasing, "interrupt [the] journey" (dis. opn., post, at p. 1124) of the wheelchair or the stroller. But it is absurd to say that either passenger has thereby been seized within the meaning of the Fourth Amendment.

People v. Brendlin, supra, 38 Cal.4th at 1117. The majority answers the wrong question, however. Of course the passengers in the hypothetical scenarios have been detained and thereby seized by any legal or dictionary definition[5]; but for a deliberate police action curtailing their freedom of action by force or show of authority, those passengers would not have been stopped and would have continued on their way.

The flaw in the *Brendlin* majority's reasoning is that the hypothetical focuses on whether a seizure has occurred, rather than on whether the seizure was *reasonable*. This Court has held that even the most brief police-initiated delay constitutes a detention; this is a distinct inquiry from the issue of whether such a detention is reasonable. *See Mich. Dep't of State Police v. Sitz* 496 U.S. 444, 450, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

---

[5]A detention is "[t]he act or fact of holding a person in custody; confinement or compulsory delay." *Black's Law Dictionary*, p.459 col.2 (7th ed. 1999). Certainly a person delayed by a police stop of the vehicle in which is a passenger has been subjected to a "compulsory delay."

The Fourth Amendment protects no person, whether passenger or driver, against seizures that are reasonable, and if the detention is reasonable as to the driver (or as to the parent or orderly), then certainly that detention is reasonable as to an incidentally seized passenger, as well.

But if the police action is unreasonable at its inception, as the People conceded was the case here (*People v. Brendlin, supra,* 38 Cal.4th at1114)[6], then that action is unreasonable as to all parties who have had their freedom of action interrupted by the unlawful police conduct. This Court should grant this petition for writ of certiorari in order to correct California's erroneous interpretation of this Court's precedents.

C. The Decision of the California Supreme Court Is at Odds with the Holdings of Those Federal Circuits That Have Considered the Issue of Whether a Passenger May Challenge an Unlawful Traffic Stop

Although this Court has never directly addressed the issue of whether a passenger in a car subjected to a traffic stop may raise a Fourth Amendment challenge to that stop by virtue of the fact that he was "detained" when the driver submitted to the officer's show of authority and stopped the car, an overwhelming majority of federal circuit courts to have considered the issue have found that a passenger may challenge a traffic stop

---

[6]The California Vehicle Code specifically authorizes the legal operation of a vehicle on a public street or highway where the vehicle displays a temporary operating permit or sticker in lieu of a license plate. Veh. Code, § 4853. Under section 4853, all provisions of the Vehicle Code relating to license plates also apply to temporary operating permits, so that in legal effect a temporary operating permit functions as an alternative to the license plates required on motor vehicles. See also California Vehicle Code § 4606.

under these circumstances. *See, e.g., United States v. Mosley, supra*, 454 F.3d 249; *United States v. Grant*, 349 F.3d 192 (5th Cir. 2003); *United States v. Ameling*, 328 F.3d 443 (8th Cir. 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States v. Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998); *United States v. Sowers*, 136 F.3d 24 (1st Cir. 1998); *United States v. Brown*, 102 F.3d 1390 (5th Cir.1996); *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1164 (10th Cir. 1995); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993), *cert. denied*, 511 U.S. 1010, 114 S. Ct. 1383, 128 L. Ed. 2d 58 (1994); *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991), *cert. denied*, 502 U.S. 981, 116 L.Ed.2d 609, 112 S.Ct. 584; *United States v. Erwin*, 875 F.2d 268, 270-271 (10th Cir. 1989); *United States v. Durant*, 730 F.2d 1180 (8th Cir.1984); *United States v. Williams*, 589 F.2d 210, 214 (5th Cir.1979); *cf. United States v. DeLuca*, 269 F.3d 1128, 1134 (10th Cir. 2001); *see also* 6 Wayne R. LaFave, Search and Seizure § 11.3 (4th ed. 2004); *cf. United States v. Hill*, 855 F.2d 664, 666 (10th Cir. 1988) [passenger on boat boarded by police without warrant "clearly may challenge the validity of his own arrest . . . . [and] may therefore claim that evidence found as a fruit of the arrest should be excluded."].)

Just a month after the California Supreme Court issued its opinion in *Brendlin*, a Third Circuit panel noted that every federal circuit to have considered the issue had concluded that "when a vehicle is illegally stopped by the police, no evidence found

during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged." *United States v. Mosley, supra,* 454 F.3d at 251; *see also Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In joining those circuits, the *Mosley* court distinguished cases involving automobile passengers in which no illegal stop was established or alleged. *See, e.g., Rakas v. Illinois, supra,* 439 U.S. at 130-132, and *Whren v. United States, supra,* 517 U.S. 806.

The *Mosley* opinion, like the California Supreme Court decision in *Brendlin*, contains a lengthy examination of the relevant authorities; the *Mosley* court, however, begins its analysis with the conclusion that California rejects: that a passenger is seized by virtue of a traffic stop. In fact, the issue of whether the passenger is "seized" appears to be a given even in the cases distinguished by *Mosley*, and the court noted the government's concession that the passenger had "a reasonable expectation that he would not be seized without probable cause." *United States v. Mosley, supra,* 454 F.3d at 257. The court had no difficulty in distinguishing those cases that have held that a passenger lacks a sufficient possessory interest to challenge the search of a car:

> [W]e should not be distracted by the fact that this case involves evidence found in a car. This is not an "auto search" case. The search of the car is not before us; the seizure of Mosley is. This case is about an illegal seizure by the police of the defendant, pursuant to which evidence was discovered. The violation of Mosley's Fourth Amendment rights was the traffic stop itself, and it is settled law that a traffic stop is a seizure of everyone in the stopped vehicle, see *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). Thus passengers in an illegally stopped vehicle have "standing" to object to the stop, and may seek to suppress the evidentiary fruits of that illegal seizure under the fruit of the poisonous tree doctrine, as expounded in the line of cases following *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

United States v. Mosley, supra, 454 F.3d at 253 (footnotes omitted).

Having thus disposed of the "seizure" issue, the court addressed itself to the issue of how a court should determine whether a particular passenger is entitled to suppression of evidence seized following a traffic stop, canvassing the relevant authorities to review the methods employed in the various federal circuits. The *Mosley* court distinguished the holding in *United States v. DeLuca, supra*, 269 F.3d 1128, which adopted a relatively complex "factual nexus" test to determine whether a passenger who was illegally detained during a traffic stop was entitled to suppress the fruits of the search of the vehicle. As the *Mosley* court noted, the distinguishing factor in *DeLuca*, as in *Rakas* and *Whren*, was that the traffic stop was not illegal in its inception, and thus the passenger was required to established a "but for" connection between his unlawful detention and the seizure of the evidence he sought to suppress. *United States v. Mosley, supra,* 454 F.3d at 256, *citing United States v. DeLuca, supra,* 269 F.3d at 1134.

This analytical model, the *Mosley* court held, was inappropriate for a case involving an unlawful traffic stop. *United States v. Mosley, supra,* 454 F.3d at 256. The court observed that "most courts treat evidence found during an illegal traffic stop as fruits of that stop, and see no conceptual difficulties in suppressing such evidence when introduced against passengers." *Id.*, at 257. After reviewing in great detail the various legal frameworks under which such a scenario could be analyzed, the *Mosley* court ultimately settled on the most simple answer:

> The car in which Mosley was riding was pulled over illegally. Mosley was illegally seized the moment the car was pulled over. The stopping of the vehicle was a but-for cause of the discovery of the guns. The bubble of causation which links a traffic stop to a subsequent search extends to all occupants of the stopped vehicle. To overcome Mosley's suppression motion, therefore, the government would have had to establish one of the traditional exceptions to the *Wong Sun* rule: attenuation, inevitable discovery, independent source, or some intervening act or event sufficient to purge the taint of the illegal stop. The government raised no such exception at trial, and raises none on appeal. We therefore hold that the guns were fruit of the poisonous tree and must be suppressed.

United States v. Mosley, supra, 454 F.3d at 269.

Had the California Supreme Court adopted the majority view regarding a passenger's "seizure" at the time of a traffic stop, Mr. Brendlin would have been entitled to suppression of the results of the search under any of the standards discussed in *Mosley*. The search of the car and of Mr. Brendlin's person were undertaken incident to Mr. Brendlin's arrest. Mr. Brendlin's arrest was a direct result of the unreasonable traffic stop and the resulting detention while the deputy determined whether Mr. Brendlin was

wanted for a parole violation. Thus, the seized items are causally related to the illegal traffic stop, and moreover the prosecution produced no evidence sufficient to purge the taint of the traffic stop. Under either the rationale of the *Mosley* opinion or the more restrictive rationale of the cases cited therein, Mr. Brendlin was entitled to suppression of the evidence.

Although the *Mosley* opinion contains by far the most thorough analysis of a passenger's right to move to suppress the fruits of an illegal traffic stop, most other courts have reached the same conclusion. For instance, the Ninth Circuit in *United States v. Twilley* likewise rejected an argument that an automobile passenger lacked "standing" to challenge a search of the car. The *Twilley* court held that because the defendant challenged the initial stop, which implicated his own liberty interests, he could challenge a subsequent search of the car as the fruit of the poisonous tree. *United States v. Twilley, supra,* 222 F.3d at 1095; see also *United States v. Colin*, 314 F.3d 439, 442-443 (9th Cir. 2002).

In *United States v. Kimball*, the First Circuit found the defendant's status as a passenger to be "of no consequence" in terms of his ability to challenge a traffic stop:

> The interest in freedom of movement and the interest in being free from fear and surprise are personal to all occupants of the vehicle, and an individual's interest is not diminished simply because he is a passenger as opposed to the driver when the stop occurred.

United States v. Kimball, supra, 25 F.3d at 7.

The Fifth Circuit found that a passenger could challenge an auto stop in *United States v. Roberson, supra,* 6 F.3d 1088: "Whereas the search of an automobile does not implicate a passenger's fourth amendment rights, a stop results in the seizure of the passenger and driver alike. Thus, a passenger of a stopped automobile does have standing to challenge the seizure as unconstitutional." *Id.* at 1091 (footnote omitted). That court noted that its holding reflected the majority (perhaps the unanimous) view of the federal circuit courts:

> Heretofore we have implied but not expressly so ruled. E.g., *United States v. Cardona*, 955 F.2d 976 (5th Cir.) (finding no standing to challenge search but reaching merits of challenge to stop), cert. denied, 121 L.Ed.2d 291, 113 S.Ct. 381 (1992). Our circuit colleagues have been more direct. E.g., *United States v. Erwin*, 875 F.2d 268 (10th Cir. 1989); *United States v. Portwood*, 857 F.2d 1221 (8th Cir. 1988), cert. denied, 490 U.S. 1069, 104 L.Ed.2d 638, 109 S.Ct. 2073 (1989). Accord, *United States v. Clark*, 822 F. Supp. 990 (W.D.N.Y. 1993); *United States v. Lawson*, 782 F. Supp. 1546 (S.D.Fla. 1992). See also *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.) (citing *Erwin* and "numerous state courts" that have concluded that a passenger has standing to challenge a vehicle stop), cert. denied, 116 L.Ed.2d 609, 112 S.Ct. 584 (1991).

United States v. Roberson, supra, 6 F.3d at 1091, n. 6.

The Seventh Circuit has also noted the well-established nature of the right of a passenger to challenge a traffic stop in spite of this Court's failure to rule directly on the issue. In *United States v. Powell*, that court reported that numerous state courts had found such a right. *United States v. Powell, supra*, 929 F.2d at 1195. The court went on to describe in some detail the nature of the right implicated by a traffic stop:

> By contrast to the expectation of privacy in places and things implicated by a search, the interests implicated by a vehicle stop are motorists' "freedom from random, unauthorized, investigatory seizures," *Michigan Dept. of Police v. Sitz*, 496 U.S. 444, 110 L.Ed.2d 412, 110 S.Ct. 2481, 2492 (1990) (Stevens, J., dissenting), and the interest in avoiding the "substantial anxiety," *Delaware v. Prouse*, 440 U.S. 648, 657, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), these stops may create. Both these interests are personal to the driver and passengers in the car stopped, who have their travel interrupted by the sight of a state patrol cruiser or police car looming large in the rear view mirror, are detained on the side of the road, have their identifying documents inspected by the trooper or policeman, and may even be asked to leave their vehicles for the duration of the questioning, see *Pennsylvania v. Mimms*, 434 U.S. 106, 54 L.Ed.2d 331, 98 S.Ct. 330 (1977).

United States v. Powell, supra, 929 F.2d at 1195.

In short, every federal circuit court to have considered the issue has disagreed with the position adopted by the California Supreme Court. This Court should grant the writ of certiorari in order to resolve this conflict of laws.

D. The Decision of the California Supreme Court Is at Odds with the Holdings of Most Other State Courts to Have Considered the Issue

As with the federal circuit courts, the vast majority of states to pass on the issue have held that passengers are seized in a traffic stop and may challenge both the legality of the stop and the admissibility of evidence obtained therefrom. *See, e.g., People v. Bunch*, 764 N.E.2d 1189, 1193 (Ill.App. 2002); *State v. Gomez,* 6 P.3d 765, 766 (Ariz. App. 2000); *State v. Bowers*, 976 S.W.2d 379, 381 (Ark. 1998); *State v. Harris*, 557 N.W.2d 245 (Wis. 1996); *State v. Carter*, 630 N.E.2d 355, 360-361 (Ohio 1994); *State v. Wilson*, 867 P.2d 1175, 1179 (N.M. 1994); *State v. Higgins*, 884 P.2d 1242, 1244 (Utah 1994); *Howard v. State,* 888 S.W.2d 166, 172 (Tex.Ct.App.1994); *State v. Stott*, 503

N.W.2d 822, 828 (Neb. 1993), *overruled on other grounds*, *State v. Johnson*, 589 N.W.2d 108 (Neb. 1999); *State v. Krebs*, 504 N.W.2d 580 (S.D. 1993); *McKnight v. State*, 612 N.E.2d 586, 588 (Ind.Ct.App.1993); *Ott v. State*, 600 A.2d 111 (Md. 1992), *cert. denied*, 506 U.S. 904, 113 S. Ct. 295, 121 L. Ed. 2d 219 (1992); *State v. Creech*, 806 P.2d 1080, 1082 (N.M. App. 1991); *State v. Harms*, 449 N.W.2d 1, 4 (Neb. 1989); *State v. Epperson*, 703 P.2d 761, 770-771 (Kan. 1985); *State v. Haworth*, 679 P.2d 1123, 1123-24 (Id. 1984); *State v. Eis,* 348 N.W.2d 224, 226 (Iowa 1984); *People v. Lagrone*, 464 N.E.2d 712, 714 (Ill.App. 1984); *People v. Kunath,* 425 N.E.2d 486, 489-490 (Ill.App. 1981); *State v. DeMasi,* 419 A.2d 285, 294-95 (R.I. 1980), *cert. granted and rev'd on other grounds*, 452 U.S. 934, 101 S.Ct. 3072, 69 L.Ed.2d 948 (1981).

Other state court decisions have expressly distinguished a passenger's ability to challenge a search or detention that follows a legal traffic stop from the passenger's right to challenge a search or detention following a stop that was unreasonable from its inception. Those courts are unanimous in noting that a passenger may challenge a search that is the fruit of an unlawful traffic stop. *See, e.g., State v. Wilson,* 678 N.W.2d 176, 181 (S.D. 2004); *State v. Malone*, 683 N.W.2d 1, 8 (Wis. 2004); *Kothe v. State,* 152 S.W.3d 54, 62, n. 19 (Tex. 2004); *State v. Cooper*, 579 S.E.2d 754, 756 (Ga. 2003); *State v. Hickman*, 763 A.2d 330, 336-337 (N.J. 2001); *Scott v. State*, 877 P.2d 503, 508 (Nev. 1994); *Arnold v. Commonwealth,* 437 S.E.2d 235, 237 (Va.App. 1993); *State v. Ryan*, 788

P.2d 1327, 1329 (Id. 1990); *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990); *People v. Manke*, 537 N.E.2d 13, 15 (Ill.App. 1989).

Still other states have not addressed the issue directly because they have found that a passenger may raise such a claim under state constitutional law. *E.g., Parkhurst v. State*, 628 P.2d 1369 (Wyo. 1981); *cf. People v. Millan*, 508 N.E.2d 903, 904 (N.Y. 1987) [passenger may challenge unlawful stop of taxi cab]. By far the prevailing view in the United States, then, is to find that a passenger is seized by virtue of a traffic stop, and in the event that such a stop is unreasonable, to permit the passenger to move to suppress the fruits of that seizure.

The California Supreme Court acknowledged that only two other courts had taken the position that a passenger in a car subject to a traffic stop is not seized under the Fourth Amendment. *People v. Brendlin*, *supra*, 38 Cal.4th at 1115, citing *People v. Jackson*, *supra*, 39 P.3d 1174, and *State v. Mendez*, *supra*, 970 P.2d 722; *see also Jarvis v. State*, 600 A.2d 38, 41, n.1 (Del.1991) [passenger has no "standing" to challenge stop of vehicle but may challenge subsequent detention of her person]. In *People v. Jackson*, the Colorado Supreme Court expressly approved the reasoning in *People v. Cartwright*, 72 Cal.App.4th 1362, 85 Cal.Rptr. 2d 788 (1999), a decision from the Court of Appeal of California, Fourth Appellate District, Division Three. *People v. Jackson*, *supra*, 39 P.3d at 1185. *Cartwright* in turn relied on *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), in which this Court expanded its holding from *Pennsylvania v.*

Mimms 434 U.S. 106, 98 S.Ct. 330, 54 L Ed.2d 331 (1977) and held that a passenger in a detained vehicle may, for reasons of officer safety, be ordered out of the vehicle on the same basis as the driver. In *People v. Cartwright,* the Fourth Appellate District contextualized the *Wilson* holding as follows:

> In holding that officers are entitled to order passengers out of a car as a matter of course, the majority recognized that when a traffic stop occurs, "There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers." (*Maryland v. Wilson, supra*, 519 U.S. at p. 413 [117 S.Ct. at p. 886, 137 L.Ed.2d at p. 47].) By noting the absence of any objective justification to detain passengers in cars stopped for traffic violations, however, the court obviously did not mean to imply that passengers are routinely subjected to illegal seizures. We believe it was saying passengers are not "detained" as the law uses that term.

People v. Cartwright, supra, 72 Cal.App.4th at 1367. The *Cartwright* court's quotation from *Wilson* is misleading, however, because it omits the language immediately following the passage quoted above: "But as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." *Maryland v. Wilson, supra,* 519 U.S. at 413. In its full context, then, the holding in *Wilson* does not support an inference that a passenger is not detained by virtue of a traffic stop, and *Cartwright* is not persuasive authority.

The Colorado Supreme Court concluded in *Jackson* that a passenger is not detained by a traffic stop because "a traffic stop is an investigatory stop of the driver; the display of authority and control is directed at the driver, not the passenger." *People v. Jackson, supra,* 39 P.3d at 1185. The court further concluded that because the show of authority is directed at the driver, a reasonable passenger would feel free to leave or to

terminate the encounter. *Id.* at 1186. Given this Court's holding in *Wilson* that an officer may order a passenger out of the car during a traffic stop as a matter of course, *with no additional suspicion of wrongdoing*, this conclusion regarding what a reasonable passenger would believe appears to be untenable at best. *See Maryland v. Wilson, supra,* 519 U.S. at 410.

The *Jackson* decision also relied upon its own precedent in *People v. H. J.*, 931 P.2d 1177 (Colo. 1997), a case involving a legitimate, non-pretextual traffic stop in which the officers only began to suspect the passenger of wrongdoing after they began their investigation. Although the only issue in *H. J.* was "whether the questioning of the passengers . . . was lawful under the totality of the circumstances surrounding the vehicle stop," the court noted in passing that "[g]enerally, the detention of the passengers in a stopped vehicle is merely coincidental with the detention of the driver." *H. J., supra*, 931 P.2d at1181. Whether the passengers had been seized in the stop was not material to the *H. J.* decision given that the stop itself was proper, and the court never determined whether the passengers had been seized or not.

In *Jackson*, however, the Colorado Supreme Court held that *H. J.* "implicitly recognized that passengers, unlike drivers, are not seized within the meaning of the Fourth Amendment" when the *H.J.* court stated that "an officer need not initially have reasonable suspicion as to all the occupants in the car and that the detention of passengers is merely coincidental with the detention of the driver." *Jackson, supra*, 39 P.3d at 1185.

This reasoning is unpersuasive. The fact that an officer is not suspicious of a passenger before the stop says nothing about whether the passenger is seized by the stop itself, and the fact that a passenger's detention is "coincidental" does not alter the fact that he was, indeed, detained. *Cf. Berkemer v. McCarty, supra*, 468 U.S. at 436.

The only other jurisdiction to hold that passengers are not seized in a traffic stop is the state of Washington. In *State v. Mendez, supra*, 970 P.2d 722, the Washington Supreme Court reversed an order granting a passenger's motion to suppress, saying that "the trial court's conclusion Mendez was seized by the traffic stop is clearly wrong." *Id.*, 970 P.2d at 729. But this decision, too, was based on a misunderstanding of *Maryland v. Wilson*. *State v. Mendez*, like *People v. Cartwright*, relied on a passage in *Wilson* in which this court focuses on the justification for the seizure, rather than on whether a seizure had occurred: "There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers." *Wilson, supra*, 519 U.S. at 413-414, quoted in *Mendez, supra*, 970 P.2d at 729. But the fact that officers have no equivalent *reason* to stop the passenger does not alter the fact that they *do* stop the passenger along with the driver and the rest of the car.

Like the California Supreme Court in *Brendlin*, the Washington Supreme Court disregarded *Whren, supra*, by making the officer's state of mind part of the analysis. And like the *Cartwright* court and the California Supreme Court in *Brendlin*, both the Colorado and Washington courts make the error of conflating the issue of whether a

passenger has been *reasonably* detained with the issue of whether he has been detained at all. In doing so, these courts part ways with the overwhelming weight of state and federal authorities. This Court should grant certiorari to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: November 27, 2006

Respectfully submitted,



CENTRAL CALIFORNIA
APPELLATE PROGRAM

GEORGE BOND
Executive Director

ELIZABETH CAMPBELL
Staff Attorney

2407 J Street, Suite 301
Sacramento, CA 95816
(916)441-3792

Attorneys for Petitioner

APPENDIX A

SUPREME COURT
FILED

JUN 29 2006

Frederick K. Ohlrich Clerk

Deputy

COPY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRUCE EDWARD BRENDLIN, Defendant and Appellant.	S123133 Ct.App. 3 C040754 Sacramento County Super. Ct. No. CRF012703

When a peace officer directs the driver of a vehicle to pull over for a traffic stop but, in effecting the stop, gives no indication that the passenger of the vehicle is the focus of the officer's investigation or show of authority, is the passenger subjected to a "seizure" within the meaning of the Fourth Amendment? This is a question that has divided courts inside and outside this state. We find that the passenger, whose progress is momentarily stopped as a practical matter, is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority. We therefore reverse the judgment of the Court of Appeal, which (1) held that the passenger was automatically seized as a result of the traffic stop, (2) determined that the traffic stop was unlawful, and (3) suppressed the evidence of methamphetamine manufacturing found in the car and on defendant's person as the fruit of the illegal seizure.

SEE DISSENTING OPINION

BACKGROUND

Around 1:40 a.m. on November 27, 2001, Sutter County Sheriff's Deputy Robert Charles Brokenbrough effected a traffic stop of a brown 1993 Buick Regal with expired registration tabs on Franklin Avenue in Yuba City. Prior to the stop, Deputy Brokenbrough confirmed through dispatch that the car's registration had expired two months earlier but that an application was "in process" to renew the registration. Although Deputy Brokenbrough observed that a temporary operating permit with the number "11" (indicating an expiration date at the end of November) had been taped to the rear window, he could not determine from his vantage point whether the permit matched the vehicle and decided to stop the Buick to investigate further.

Deputy Brokenbrough approached the driver's side of the Buick and asked the driver, Karen Simeroth, for her driver's license. He also asked defendant, the passenger, to identify himself, since he recognized defendant as one of the Brendlin brothers, Scott or Bruce, and recalled that one of them had absconded from parole supervision. During the inquiry, Deputy Brokenbrough observed receptacles in the car containing substances used in the production of methamphetamine. In response to the deputy's inquiry, defendant falsely identified himself as Bruce Brown. The deputy returned to his patrol vehicle and verified that Bruce Brendlin was a parolee at large and had an outstanding no-bail warrant for his arrest. During this period, defendant opened and then closed the passenger door of the Buick.

After requesting backup, Deputy Brokenbrough pointed his weapon at defendant, ordered him out of the car, and placed him under arrest for the parole violation. The entire episode, from the time Deputy Brokenbrough asked Simeroth for her driver's license to his discovery that defendant had an outstanding warrant, lasted a couple of minutes.

BEST AVAILABLE COPY

Police found an orange syringe cap on defendant's person during a search incident to arrest. They found two hypodermic needles (one of which was missing a syringe cap), two baggies containing a total of 12.43 grams of marijuana, and a baggie containing 0.46 grams of methamphetamine on Simeroth's person during a patsearch and a subsequent search incident to her arrest. Materials used in manufacturing methamphetamine were found in the back seat of the Buick.

After a hearing on defendant's motion to suppress, the superior court held that defendant had not been seized within the meaning of the Fourth Amendment until Deputy Brokenbrough ordered him out of the car at gunpoint and placed him under arrest: "He was free to leave. And if he had opened the door and got out and taken a hike, then this officer would have had to decide whether he had something less than probable cause to detain him, and then he would have been detained. But he wasn't detained because he never went anywhere; but he had a right to if he wanted to." The court determined next that even if defendant had been seized at an earlier point, the traffic stop was lawful; even if the stop had been unlawful, defendant, as a passenger, lacked standing[1] to suppress the items seized from the Buick.

Following the denial of his motion to suppress, defendant pleaded guilty to manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and

---

1 The United States Supreme Court has largely abandoned use of the word "standing" in its Fourth Amendment analysis. (See *Minnesota v. Carter* (1998) 525 U.S. 83, 87-88.) "It did so without altering the nature of the inquiry: whether the defendant, rather than someone else, had a reasonable expectation of privacy in the place searched or the items seized." (*People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3.) We have embraced the high court's formulation and no longer analyze this substantive issue as one of standing. (*Ibid.*; *People v. Valdez* (2004) 32 Cal.4th 73, 121, fn. 24.)

admitted a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). He was sentenced to four years in prison.

The Court of Appeal reversed in a published opinion. It held that a traffic stop necessarily results in a detention (and, hence, a seizure (*People v. Glaser* (1995) 11 Cal.4th 354, 363)) of both the driver and the passengers, rejecting the analysis and holdings of *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373-1374; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1367-1369; and *People v. Fisher* (1995) 38 Cal.App.4th 338, 343-344. The Court of Appeal further found that the stop was unlawful in that Deputy Brokenbrough, who knew that the vehicle's application to renew its registration was in process and who had seen the temporary permit in the rear window, had "at most a hunch" that "the temporary operating permit displayed in the window might not belong to the car and, thus, it was being unlawfully operated as an unregistered vehicle." The court ruled that the evidence seized from defendant as well as from the Buick should have been suppressed.

We granted review, limited to (1) whether defendant, as a passenger in a vehicle subjected to a traffic stop, was seized within the meaning of the Fourth Amendment; and (2) whether reasonable suspicion exists that a car is unregistered when it exhibits an expired registration tab on its license plate but displays what appears to be a valid temporary operating permit in its rear window.

DISCUSSION

"In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279 [99 Cal.Rptr.2d 532, 6 P.3d 193].) We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is

subject to independent review. (*Ibid.*)" (*People v. Ramos* (2004) 34 Cal.4th 494, 505.)[2] In evaluating whether the fruits of a search or seizure should have been suppressed, we consider only the Fourth Amendment's prohibition on unreasonable searches and seizures. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141.) "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." (*Rakas v. Illinois* (1978) 439 U.S. 128, 131, fn. 1.)

Prior to the vehicle stop here, Deputy Brokenbrough noticed that the registration tabs on the Buick's license plate were expired. However, he also observed a current temporary operating permit in the car's rear window and had received radio confirmation that an application for renewal of the vehicle's registration was indeed in process. Conceding that "[a] vehicle with an

---

[2] State courts and the lower federal courts are divided as to the appropriate standard of review of a finding that a seizure has or has not occurred. Many courts hold that this is a question of law or a mixed question of law and fact subject to de novo review. (*U.S. v. Smith* (1st Cir. 2005) 423 F.3d 25, 31, fn. 4; *id.* at p. 36 & fn. 9 (dis. opn. of Lynch, J.) [citing cases from the Second, Third, Sixth, Eight, Tenth, and District of Columbia Circuits]; *LaDuke v. Nelson* (9th Cir. 1985) 762 F.2d 1318, 1327; accord, *State v. Kachanian* (Hawai'i Ct.App. 1995) 896 P.2d 931, 938; *State v. Harris*, (Minn. 1999) 590 N.W.2d 90, 98; *State v. Jason L.* (N.M. 2000) 2 P.3d 856, 863; *State v. Carter* (Utah Ct.App. 1991) 812 P.2d 460, 465, fn. 3; *McGee v. Com.* (Va.Ct.App. 1997) 487 S.E.2d 259, 261; *State v. Thorn* (Wn. 1996) 917 P.2d 108, 111; *State v. Garcia* (Wis.Ct.App. 1995) 535 N.W.2d 124, 126.) Other courts hold that this is a question of fact subject to review for substantial evidence or clear error. (*U.S. v. Mask* (5th Cir. 2003) 330 F.3d 330, 335; *U.S. v. Wilson* (4th Cir. 1991) 953 F.2d 116, 121; *U.S. v. Teslim* (7th Cir. 1989) 869 F.2d 316, 321; accord, *Lindsay v. State* (Alaska Ct.App. 1985) 698 P.2d 659, 661; *State v. Hill* (Conn. 1996) 675 A.2d 866, 871; *State v. Raker* (Fla.Dist.Ct.App. 2004) 883 So.2d 887, 888-889.) Because the parties here do not address the issue—and because our decision would be the same under either standard—we find it unnecessary to resolve the conflict. (See *U.S. v. Boone* (5th Cir. 1995) 67 F.3d 76, 77, fn. 1.)

application for renewal of expired registration would be expected to have a temporary operating permit," the Attorney General no longer argues that Deputy Brokenbrough had articulable suspicion the Buick's registration was invalid. The Attorney General argues instead that defendant has no entitlement to suppression of the evidence uncovered during the traffic stop because he, as a passenger, was not seized within the meaning of the Fourth Amendment until Deputy Brokenbrough ordered him out of the car at gunpoint and arrested him under the outstanding no-bail warrant, which provided lawful cause for the seizure. Defendant, on the other hand, argues that he was seized at the moment the driver submitted to the show of official authority and stopped the car, which preceded the deputy's discovery of the outstanding warrant.[3]

It is well settled that the driver of a vehicle that is the subject of a traffic stop is seized within the meaning of the Fourth Amendment. (*Whren v. United States* (1996) 517 U.S. 806, 809-810.) Neither this court nor the United States Supreme Court, however, has yet decided whether the driver's submission to the show of authority results in a seizure of the *passenger*. A majority of courts, including several federal circuit courts and some state courts, have embraced a per se rule that the passenger is seized at the moment the driver submits to the official show of authority. (E.g., *U.S. v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *U.S. v. Eylicio-Montoya* (10th Cir. 1995) 70 F.3d 1158, 1163-1164; *U.S. v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5; *U.S. v. Roberson* (5th Cir. 1993) 6 F.3d 1088, 1091; *U.S.*

---

3 Defendant concedes that, as a mere passenger, his Fourth Amendment rights were not violated by the search of his codefendant's vehicle. (*Rakas v. Illinois*, *supra*, 439 U.S. at pp. 133, 148; accord, *People v. Valdez*, *supra*, 32 Cal.4th at p. 122.) He claims instead that suppression of the incriminating evidence found in the car is required because it was the fruit of an unlawful seizure of his person.

v. Powell (7th Cir. 1991) 929 F.2d 1190, 1195; *State v. Hernandez* (Fla.Dist.Ct.App. 1998) 718 So.2d 833, 836; *People v. Bunch* (Ill. 2003) 796 N.E.2d 1024, 1029; *State v. Eis* (Iowa 1984) 348 N.W.2d 224, 226; *State v. Carter* (Ohio 1994) 630 N.E.2d 355, 360; *Josey v. State* (Tex.Crim.App. 1998) 981 S.W.2d 831, 837-838; see also 6 La Fave, Search and Seizure (4th ed. 2004) § 11.3(e), pp. 194-195, fn. 277 [citing cases].) Other courts, reasoning that the passenger in a vehicle subject to a traffic investigation is stopped for practical purposes but not by virtue of the show of official authority, hold that the passenger is not seized for Fourth Amendment purposes. (E.g., *People v. Jackson* (Colo. 2002) 39 P.3d 1174, 1184-1186; *State v. Mendez* (Wn. 1999) 970 P.2d 722, 729; see also 6 La Fave, Search and Seizure, *supra*, § 11.3(e), p. 193, fn. 272 [citing cases].)

This division of authority is reflected in the courts of our own state. Some courts agree with defendant that the interference with the passenger's freedom of movement occasioned by the traffic stop constitutes a seizure. (*People v. Bell* (1996) 43 Cal.App.4th 754, 765; *People v. Hunt* (1990) 225 Cal.App.3d 498, 505; *People v. Grant* (1990) 217 Cal.App.3d 1451, 1457-1458.) Other courts agree with the Attorney General that although the driver must submit to the officer's instructions, the passenger is free to disregard the police and go about his or her business, and that the incidental restriction of the passenger's freedom of movement is therefore not a seizure. (*People v. Castellon*, *supra*, 76 Cal.App.4th at p. 1374; *People v. Cartwright*, *supra*, 72 Cal.App.4th at p. 1369 (*Cartwright*); *People v. Fisher*, *supra*, 38 Cal.App.4th at p. 344; *People v. Gonzalez* (1992) 7 Cal.App.4th 381, 384.)

At the heart of this debate lies the definition of a seizure in the Fourth Amendment's prohibition on "unreasonable searches and seizures." Justice Stewart's opinion in *United States v. Mendenhall* (1980) 446 U.S. 544, 554, which

has been adopted by the court in subsequent cases (e.g., *Michigan v. Chesternut* (1988) 486 U.S. 567, 573), states that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Fn. omitted.) The high court subsequently made clear that this test "states a *necessary*, but not a *sufficient*, condition for seizure." (*California v. Hodari D.* (1991) 499 U.S. 621, 628 (*Hodari D.*).) That is, there must also be an actual taking into custody, whether by the application of physical force or by submission to the assertion of authority. (*Id.* at p. 626.) The court has also cautioned against an undue focus on the fact that government action caused some restriction on an individual's freedom of movement: " 'a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever there is a governmentally caused and *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied*.' " (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 844, quoting *Brower v. County of Inyo* (1989) 489 U.S. 593, 596-597.) Finally, the court has reminded us that where the individual may not feel free to leave for reasons *independent* of the police conduct—such as a passenger on a bus that is scheduled to depart shortly—the proper inquiry is "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " (*Florida v. Bostick* (1991) 501 U.S. 429, 437; accord, *People v. Celis* (2004) 33 Cal.4th 667, 673.)

It is passing strange, then, that defendant focuses so little attention on the definition of a seizure. Defendant (like the Court of Appeal below and the other

cases embracing the majority view) instead advances an argument that rests on two other foundations: (1) dicta from United States Supreme Court decisions; and (2) the fact that a traffic stop curtails the freedom of movement of the passenger as well as the driver.

Although defendant concedes that the high court has not decided whether a passenger is necessarily seized by virtue of a traffic stop, he asserts that dicta from the high court has "strongly hinted" in that direction. In *Delaware v. Prouse* (1979) 440 U.S. 648, 653, for example, the court observed that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendment[], even though the purpose of the stop is limited and the resulting detention quite brief." (See also *Berkemer v. McCarty* (1984) 468 U.S. 420, 436-437 [quoting *Prouse*].) In *Colorado v. Bannister* (1980) 449 U.S. 1, 4, footnote 3, the court reiterated that "[t]here can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment," citing *Prouse*. There is no debate here, though, whether a traffic stop results in a seizure. The issue, rather, is *who* (or what) has been seized. Inasmuch as *Bannister* and *Berkemer* involved the driver of the vehicle (*Bannister*, *supra*, 449 U.S. at p. 4; *Berkemer*, *supra*, 468 U.S. at p. 423) and *Prouse*, according to the opinion of the state supreme court, involved the owner and "operator" of the vehicle (*Prouse*, *supra*, 440 U.S. at p. 650, fn. 1), none of these cases is particularly illuminating on the status of a mere passenger.

Defendant, like the courts embracing the majority view, also relies on the observation in *Berkemer v. McCarty*, *supra*, 468 U.S. at page 436, that "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle." It is important to recognize, however, that *Berkemer*'s observation was made in the context of whether a motorist detained pursuant to a traffic stop was in custody for purposes of the *Fifth* Amendment.

(*Id.* at p. 435.) Whether a person is in custody for purposes of the Fifth Amendment is an inquiry distinct from whether a person has been seized within the meaning of the Fourth Amendment. (*U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 131 ["The 'custody' that implicates the *Miranda* rule is conceptually distinct from a seizure implicating the Fourth Amendment"]; *U.S. v. Smith* (7th Cir. 1993) 3 F.3d 1088, 1097 [the determination of custody under the Fifth Amendment requires "a completely different analysis" from that under the Fourth Amendment].) Indeed, as the high court has emphasized, " 'a governmentally caused termination of an individual's freedom of movement' " does not necessarily establish that a seizure under the Fourth Amendment has occurred. (*County of Sacramento v. Lewis, supra*, 523 U.S. at p. 844.) A police detention of an orderly pushing a wheelchair-bound individual or a detention of a parent pushing a child in a stroller may well incidentally curtail the freedom of action of the passengers who are dependent on those adults. The detention of the orderly or parent will also, to use the dissent's phrasing, "interrupt [the] journey" (dis. opn., *post*, at p. 1) of the wheelchair or the stroller. But it is absurd to say that either passenger has thereby been seized within the meaning of the Fourth Amendment.

The cases embracing the majority view also assert that "[n]o principled basis exists for distinguishing between the privacy rights of passengers and drivers in a moving vehicle. When the vehicle is stopped they are equally seized; their freedom of movement is equally affected." (*State v. Eis*, *supra*, 348 N.W.2d at p. 226; see also *People v. Bell*, *supra*, 43 Cal.App.4th at p. 763.) In reality, though, the passenger is not subject to the same restraints as the driver. The driver is obliged to remain at the scene until the completion of the officer's investigation. "[T]he passenger is stopped too, but only coincidentally." (*People v. Jackson*, *supra*, 39 P.3d at p. 1185.) Absent further direction from the officer effecting the stop (see *Maryland v. Wilson* (1997) 519 U.S. 408, 410) or some indication that

the passenger is the subject of the officer's investigation or show of authority, the passenger is free to ignore the police presence and go about his or her business. Alternatively, the passenger may choose to wait until the investigation of the driver is completed. In either case, "it is this element of choice that distinguishes the passenger's circumstance from the driver's, for the driver has been seized and is therefore not free to go." (*Jackson*, *supra*, at p. 1185.) The fact that defendant's freedom of movement was momentarily curtailed by the traffic stop thus does not determine whether he was seized. To answer that question we must return to the high court's definition of a "seizure."

A seizure occurs when the police, by the application of physical force or show of authority, seek to restrain the person's liberty (*Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16; *County of Sacramento v. Lewis*, *supra*, 523 U.S. at p. 844); the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter (*Florida v. Bostick*, *supra*, 501 U.S. at p. 436); and the person actually submitted to that authority (*Hodari D.*, *supra*, 499 U.S. at p. 626) for reasons not "independent" of the official show of authority (*Florida v. Bostick*, *supra*, 501 U.S. at p. 436). Admittedly, the application of this test to particular circumstances is sometimes more an art than a science. (See *Michigan v. Chesternut*, *supra*, 486 U.S. at p. 573 [the test "is necessarily imprecise"].) As the high court has emphasized, "for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.' " (*United States v. Drayton* (2002) 536 U.S. 194, 201; accord, *People v. Souza* (1994) 9 Cal.4th 224, 235.) In this case, defendant has not shown that he, as the passenger, was the subject of the deputy's show of authority or that he actually submitted to it.

Deputy Brokenbrough's flashing lights were directed at the driver, Karen Simeroth, and not at defendant. Indeed, the record does not indicate that Brokenbrough was even aware defendant was in the car prior to the vehicle stop. Once the car came to a stop, the deputy approached the driver's side of the vehicle, without blocking defendant's exit, brandishing a weapon at him, or making any intimidating movements towards him. In these circumstances, one cannot say that defendant was the subject of the deputy's investigation or show of authority prior to the time the deputy ordered him out of the vehicle. (See *United States v. Drayton*, *supra*, 536 U.S. at pp. 203-204 [no seizure occurred when officers boarded the bus and began questioning passengers].)

Rather, "[a]n officer causing a vehicle to pull over in transit is conducting an investigatory stop of the *driver*." (*People v. Jackson*, *supra*, 39 P.3d at p. 1182, italics added.) "[T]he display of authority and control is directed at the driver, not the passenger." (*Id.* at p. 1185.) "While we are all familiar with the sinking feeling a driver experiences upon seeing police lights in the rearview mirror, few of us sense impending doom when we are in the passenger seat." (*Cartwright*, *supra*, 72 Cal.App.4th at pp. 1374-1375; see also *People v. Jackson*, *supra*, at p. 1185.) Thus, as the dissent concedes, "[a] passenger may not be the subject of a police investigation, at least in the initial phase of the traffic stop." (Dis. opn., *post*, at p. 2.)

More importantly, defendant, as the passenger, had no ability to submit to the deputy's show of authority. As the *Cartwright* court noted, the passenger "is not a participant in the stop, but an observer." (*Cartwright*, *supra*, 72 Cal.App.4th at p. 1375.) Not only is the driver the one the officer is seeking to restrain, but the driver is the only one who, by stopping the car, can submit to the officer's assertion of authority. The passenger may be asleep or otherwise unaware of the officer's presence. The passenger may disagree with the driver's decision to

submit to the officer's authority and may even object vociferously, but to no effect. "The passenger simply has no say in the matter." (*Id.* at p. 1367.)

To be sure, the passenger must in most cases remain in the car until it stops, and to that extent (as the dissent points out) the passenger's freedom is curtailed. But it is critical, for purposes of the Fourth Amendment analysis, to determine *why* the passenger's freedom is curtailed. Although defendant points out that "it is simply not possible for a passenger to avoid being literally and physically detained under these circumstances, however momentarily," this is so because, under the vast majority of circumstances, it is unsafe for the passenger to exit a moving vehicle. The passenger will also, in most cases, prefer to await the completion of the traffic stop and continue en route in the company of the driver. Neither factor, however, means that the passenger has been seized within the meaning of the Fourth Amendment. (*Florida v. Bostick*, *supra*, 501 U.S. at p. 436 ["Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus"]; see generally *United States v. Drayton*, *supra*, 536 U.S. at p. 206 ["The arrest of one person does not mean that everyone around him has been seized by police"].) The "liberty" contemplated by the high court's definition of a seizure—i.e., "when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at *liberty* to ignore the police presence and go about his business" ' " (*Kaupp v. Texas* (2003) 538 U.S. 626, 629 italics added)—refers not to whether the individual has the physical *capacity* to leave the scene but to whether, assuming the individual had the physical capacity to do so, he or she would feel free to depart or otherwise to conduct his or her affairs as though the police were not present. (See *Bostick*, *supra*, 501 U.S. at p. 436 [that "Bostick's movements were 'confined' . . . says nothing about whether or not the police conduct at issue was coercive"].) After all, an individual may

manifest an unwillingness to engage with the police not only by departing the area, but also by staying put and declining to answer questions or otherwise ignoring police inquiries. Similarly, a seizure can occur even though the individual has the physical capacity to leave the scene.

Neither defendant nor the dissent ever explains why the same analysis should not apply to the detention of a *moving* vehicle containing a driver and passenger and the detention of a *parked* vehicle containing a driver and passenger—or, for that matter, the detention of a motorcycle or a bicycle with a driver and passenger. (Cf. *United States v. Drayton*, *supra*, 536 U.S. at p. 204 [that the encounter took place on a bus rather than on the street "does not on its own transform standard police questioning of citizens into an illegal seizure"].) Absent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot—i.e., exit the vehicle or dismount from the motorcycle or bicycle and thereby terminate the encounter with the officer. (Cf. *U.S. v. Slater* (8th Cir. 2005) 411 F.3d 1003, 1005 [passenger was not seized while driver took field sobriety tests].) In this case, for example, defendant indicated his awareness of the available options by opening, and then closing, the passenger door.

The distinction between a passenger whose progress is stopped because the driver is seized and a passenger who is himself or herself seized is consistent with the high court's analysis in *Maryland v. Wilson*, *supra*, 519 U.S. 408, which addressed the separate issue whether a police officer may as a matter of course order not just the driver to exit the vehicle during a traffic stop, but the passengers as well. The high court found that in light of the interest in officer safety, ordering the passenger out of the vehicle was not an unreasonable seizure, but declined to decide whether the passenger could be held for the entire duration of the stop. (*Id.* at p. 415, fn. 3.) The high court did, however, acknowledge one important

distinction between the driver and the passengers: "There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But *as a practical matter*, the passengers are already stopped by virtue of the stop of the vehicle." (*Id.* at pp. 413-414, italics added.) Justice Stevens's dissenting opinion agreed with the majority's implied distinction between being stopped as a *practical* matter and being seized as a *constitutional* matter: the intrusion on a passenger's freedom of movement occasioned by the traffic stop "was a necessary by-product of the lawful detention of the driver. But the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state-imposed delay not directed at a particular individual constitutes a seizure of that person." (*Id.* at p. 420 (dis. opn. of Stevens, J.).)

The rule proposed by the defendant and endorsed by the Court of Appeal and the dissent here, in which a seizure occurs whenever the defendant's freedom of movement "is significantly curtailed by an officer's act of making the driver stop the car," would find a seizure in these circumstances of state-imposed delay. Indeed, the proposed rule would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority. It would be inaccurate to say that these motorists, whose journey is interrupted by virtue of the traffic stop of another vehicle but who do not actually submit to the show of police authority, are seized within the meaning of the Fourth Amendment. The same is true of a

passenger such as defendant, who likewise suffers a curtailment of his freedom but does not actually submit to the show of police authority.[4]

Defendant's proposed rule would also make unduly problematic the determination of when a seizure has ended. He asserts that "[w]hether a passenger remains detained thereafter may depend upon whether, under the circumstances, a reasonable person would feel free to leave while the officer deals with the driver." But very rarely does the officer affirmatively express an investigative interest (or lack thereof) in the passengers of a detained vehicle. The officer's interest in such circumstances, as defendant concedes, is with the driver. This suggests that, under defendant's approach, the alleged seizure of a passenger must terminate of its own accord, either by the passage of time or by the officer's focus on the driver. If the seizure terminates simply by the passage of time, then the question arises of how

---

[4] The dissent asserts that the requirement of submission "simply does not apply in these circumstances" (dis. opn., *post*, at p. 3), but, as the high court has made clear, a seizure "requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority. [¶] . . . 'There can be no arrest without either touching or submission.' " (*Hodari D.*, *supra*, 499 U.S. at pp. 626-627.)

Moreover, the dissent's analysis would effectively diminish protections for passengers. If, as the dissent contends, a traffic stop inflexibly results in a seizure of the passengers until the officer explicitly says otherwise, then any passenger who nonetheless tried to proceed on his or her way could be arrested under Penal Code section 148 (and then subjected to a search incident to the arrest) for resisting or delaying the officer in the performance of his or her duties. (See, e.g., *In re Muhammad C.* (2002) 95 Cal.App.4th 1325, 1329; *People v. Quiroga* (1993) 16 Cal.App.4th 961, 967.) We think it more sensible to leave it up to the officer, once cause for the vehicle stop has been established, to decide who should be seized and when. And, in light of the high court's "clear direction that an assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account ' "all of the circumstances surrounding the incident" ' in each individual case" (*Michigan v. Chesternut*, *supra*, 486 U.S. at p. 572), it is also more appropriate to examine the totality of the circumstances before determining whether the passenger has been seized during a traffic stop.

many minutes the passengers must wait. If, on the other hand, the seizure terminates at the end of the traffic stop or as soon as the officer tells the passengers they are free to leave, then it follows that the passengers are *also* at liberty to go about their business if, at an even earlier stage, the passengers can reasonably draw that same inference about the focus of the officer's investigation or show of authority. In this case, for example, defendant reasonably would have surmised that Deputy Brokenbrough was focused on the driver when the traffic stop was initiated. Because defendant knew he was free to ignore the police presence and go about his business at that stage, even if he was unable as a practical matter to leave the scene until the car came to a halt, he could not have been seized merely by the initiation of the traffic stop.

The dissent would find that passengers generally, and defendant in particular, are seized from the inception of every traffic stop, but the dissent's reasoning is faulty. Although the dissent concedes that a passenger may not be the subject of the police investigation, at least in the initial phase of the traffic stop, it contends that a seizure nonetheless occurs because "the officer *has the authority*, as a matter of law, to order that the passengers . . . get out of the vehicle" once the vehicle pulls over. (Dis. opn., *post*, at p. 1, italics added.) We do not doubt the officer has such authority, which is recognized explicitly in *Maryland v. Wilson*, *supra*, 519 U.S. at page 410, nor do we dispute that the passenger is seized once the officer *actually invokes that authority to order the passenger out of the car*. But the dissent offers no authority for its critical assumption that the mere *potential* an officer *might* invoke such authority itself constitutes a seizure.

The dissent also asserts that the failure to deem a passenger automatically seized in every traffic stop will lead to anomalous consequences in that the driver, who has been seized, will be able to suppress the fruits of an unlawful seizure, but the passenger, who has not been seized, may not be able to obtain such relief. If

50

this is an anomaly, it is hardly unique, inasmuch as the potential for unequal treatment has existed under similar circumstances ever since the high court abolished automatic standing. In *Rakas v. Illinois*, *supra*, 439 U.S. 128, for example, the high court held that mere passengers—unlike drivers or owners of the vehicle—had no legitimate expectation of privacy that was violated by a vehicle search. (*Id.* at pp. 148-149; accord, *People v. Valdez*, *supra*, 32 Cal.4th at p. 122). The high court has also remarked that a casual visitor would similarly be unable to challenge a house search (*Rakas*, *supra*, at p. 142; accord, *People v. Ooley* (1985) 169 Cal.App.3d 197, 202-203; see also *People v. Ayala*, *supra*, 23 Cal.4th at p. 255 [invitee or social guest has no expectation of privacy in business premises]), although the owner or other residents would be able to do so.

Thus, the Fourth Amendment does not concern itself with "treat[ing] driver and passenger alike" in all circumstances (dis. opn., *post*, at p. 5), nor does assuring equity between drivers and passengers justify expanding the reach of the exclusionary rule beyond what the Fourth Amendment requires. (See *Alderman v. United States* (1969) 394 U.S. 165, 174 ["There is no necessity to exclude evidence against one defendant in order to protect the rights of another"].) " 'Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.' " (*In re Lance W.* (1985) 37 Cal.3d 873, 882, quoting *Rakas v. Illinois*, *supra*, 439 U.S. at p. 137.) Accordingly, "the deterrent purpose of the exclusionary rule does not require its application when unlawfully seized evidence is offered against a defendant whose own rights have not been compromised by the unlawful seizure." (*Lance W.*, at p. 882.)

We emphasize that passengers who are in vehicles subjected to unjustified traffic stops are not without constitutional protection. Once the vehicle has been

stopped, the passenger may not be detained thereafter without reasonable suspicion the passenger is involved in criminal activity. (*People v. Souza*, *supra*, 9 Cal.4th at p. 230; cf. *Maryland v. Wilson*, *supra*, 519 U.S. at p. 410 [police may order the driver and passengers of a "lawfully stopped" car to exit the vehicle].) Furthermore, neither the passenger nor the passenger's belongings in the vehicle may be searched without lawfully acquired cause to justify an arrest (*New York v. Belton* (1981) 453 U.S. 454) or a search (*Wyoming v. Houghton* (1999) 526 U.S. 295). A passenger in a car subjected to an unjustified stop may also be able to prosecute a civil suit against the police under the rubric of substantive due process. (See *County of Sacramento v. Lewis*, *supra*, 523 U.S. at pp. 844-845.) There is thus no need to torture the definition of a seizure to protect the security of passengers.

We therefore hold that because the deputy effected a traffic stop of Simeroth's vehicle without any indication that defendant, the vehicle's passenger, was the subject of his investigation or show of authority, defendant was not seized when Simeroth submitted to the deputy's show of authority and brought the vehicle to a stop. Because defendant claims only that the traffic stop itself constituted a seizure, we need not consider whether defendant was seized when Deputy Brokenbrough asked him to identify himself or whether, assuming such conduct constituted a seizure, it was justified by the deputy's reasonable suspicion that he was a parolee at large.

DISPOSITION

The judgment of the Court of Appeal is reversed.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.
KENNARD, J.
CHIN, J.

COPY

PEOPLE V. BRENDLIN

S123133

DISSENTING OPINION BY CORRIGAN, J.

I respectfully dissent. Passengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense. Certainly no one can safely leave the vehicle before it stops. Once it has pulled over, the officer has the authority, as a matter of law, to order that the passengers remain inside (*People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374-1375), or get out of the vehicle (*Maryland v. Wilson* (1997) 519 U.S. 408, 410). This authority is soundly based on the need to protect the officer's safety. One of its necessary consequences, however, is that the passengers, having been forced to interrupt their journey, are deprived of further freedom of movement. Accordingly, the passengers have been detained and thus "seized" for Fourth Amendment purposes.

The precedents cited by the majority support this conclusion, or are distinguishable. Under the *Mendenhall* test, a person is detained if, under the circumstances, "a reasonable person would have believed that he was not free to leave." (*United States v. Mendenhall* (1980) 446 U.S. 544, 554.) When a police officer effects a traffic stop, a passenger's freedom of movement has been restrained by the intentional act of a government agent. (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 844.) The passenger is detained for a reason that is not "independent of police conduct." (*Florida v. Bostick* (1991) 501 U.S. 429, 436.) Indeed, the passenger's freedom of movement is abruptly interrupted precisely because of the officer's conduct.

The situation was quite different in *Bostick*. There, the defendant was a passenger sitting on a parked bus. When the officers boarded he was going nowhere. His freedom of movement was not curtailed by anything the officers said or did. (*Florida v. Bostick*, *supra*, 501 U.S. at pp. 431-432, 436.) Further, the *Bostick* court did not hold that there was no seizure. It simply rejected the state court's conclusion that officers may not ask bus passengers for consent to search. (*Id.* at p. 437.) As Justice O'Connor pointed out for the majority, well-settled Fourth Amendment jurisprudence would have allowed the officers to ask Bostick for his consent to search in the terminal, on the street, or in an airport. (*Id.* at p. 434.) The mere fact that consent to search was sought on a parked bus was not dispositive.

California v. Hodari D. (1991) 499 U.S. 621 does hold that submission to governmental authority is required for a detention to take place. Hodari and other young men were standing on a street and fled when police drove by. Hodari discarded contraband as he ran from an officer. The Court of Appeal suppressed the evidence on the ground that Hodari was detained when he saw the officer running toward him. (*Id.* at pp. 622-623.) The United States Supreme Court reversed, ruling that when a suspect does not yield to a show of authority, no seizure occurs. (*Id.* at p. 626.) Flight is clearly not the same as submission. However, the *Hodari D.* court had no occasion to consider anything like the situation of passengers during a traffic stop.

A passenger may not be the subject of a police investigation, at least in the initial phase of the traffic stop.[1] Passengers are detained for a different and equally important purpose: to ensure the safety of the officer. The actual

---

[1] In some cases, of course, the officer initiates a traffic stop to investigate a passenger. (See, e.g., *In re William J.* (1985) 171 Cal.App.3d 72, 77.) In those cases, the vehicle's occupants will often be unaware of the reason for the stop. Nevertheless, the rule adopted in the majority opinion requires the suspect to realize that he or she is the focus of the officer's investigation for the Fourth Amendment to apply.

submission requirement discussed by the *Hodari D.* court simply does not apply in these circumstances, which present entirely distinct practical and legal considerations.[2] Individuals on the street submit to an officer's authority by stopping or remaining in place in response to the officer's directions. An individual who sees a policeman and runs away has demonstrably not submitted to police authority.

Vehicle passengers are in a different situation. They stop when the car stops. If the driver pulls over in response to an officer's show of authority, the passengers' freedom of movement is curtailed to the same extent as the driver's. As the majority notes, "a police officer may as a matter of course order not just the driver to exit the vehicle during a traffic stop, but the passengers as well." (Maj. opn., *ante*, at p. 14; see *Maryland v. Wilson*, *supra*, 519 U.S. at p. 410.) The officer may also order the passengers to stay in the car. (*People v. Castellon*, *supra*, 76 Cal.App.4th at pp. 1374-1375; *United States v. Moorefield* (3rd Cir. 1997) 111 F.3d 10, 12-13.)[3] This per se rule, based on the need to ensure officer

---

[2] The majority reasons that if passengers are detained during a traffic stop for Fourth Amendment purposes, they would be subject to prosecution for "fleeing from a proper investigative detention" (Pen. Code, § 148) if they attempt to leave the scene. (Maj. opn., *ante*, at pp. 15-16, fn. 4.) However, that liability would arise only after a passenger became the subject of the officer's investigation. For this purpose, the rule proposed by the majority functions well. Penal Code section 148 would apply to passengers who flee in circumstances that would indicate they were the subject of the officer's investigation.

[3] While the United States Supreme Court has yet to address whether passengers may be ordered to remain in a vehicle during a traffic stop, the reasoning of the *Castellon* and *Moorefield* courts on this point is sound. The same considerations of officer safety that justify the rule authorizing the removal of passengers from a vehicle support allowing the officer to keep the passengers inside. (*People v. Castellon*, *supra*, 76 Cal.App.4th at pp. 1374-1375; *United States v. Moorefield*, *supra*, 111 F.3d at p. 13; see also *State v. Shearin* (N.C.Ct.App. 2005) 612 S.E.2d 371, 377-378 [citing cases]; cf. *Maryland v. Wilson*, *supra*, 519 U.S at p. 413.) A rule permitting passengers to leave the vehicle and wander around outside the officer's field of vision during a traffic stop would be a dangerous one indeed.

safety, requires no showing of reasonable suspicion. (*Maryland v. Wilson*, *supra*, 519 U.S at p. 412.) Driver and passenger alike are "subjected to the demands and control of the police officer" during the stop. (*United States v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5.)

The *Wilson* court observed that "[o]n the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers." (*Maryland v. Wilson*, *supra*, 519 U.S at p. 413.) The court decided the intrusion on passengers' liberty is nevertheless justified, partly because "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." (*Id.* at p. 414.) By stopping the vehicle, the officer has exerted authority over everyone in it. Because the liberty interest of passengers is *stronger* than that of drivers, they too should be afforded the protections of the Fourth Amendment.

To conclude that passengers are free to leave the scene until an officer actually exercises the authority granted by *Wilson* (maj. opn., *ante*, at p. 17), overlooks the fact that the officer has already interfered with the passengers' freedom of movement. It is not, as the majority suggests, the mere potential that an officer might order a passenger out of the car that results in a detention. It is also the prior actual application of the officer's authority in pulling the vehicle over. The stop gives rise to the officer's legitimate power under *Wilson* and *Castellon* to control the passengers' movements without any particularized justification. That official control differentiates passengers detained during a traffic stop from other citizens who are only incidentally impeded by an exercise of state authority. (See maj. opn., *ante*, at p. 15.)

I would disapprove *Castellon*, however, insofar as it held that passengers are not detained from the inception of a traffic stop. (*People v. Castellon*, *supra*, 76 Cal.App.4th at pp. 1373-1374.)

The majority's approach leads to anomalous consequences. For example, when an officer pulls over a car, the driver and passengers may all be considered to be in constructive possession of contraband found in the vehicle. Under the majority's rule, however, the driver would be protected by the Fourth Amendment but the passengers would not, even though the Supreme Court has described the passengers' liberty interest as stronger than the driver's. The majority also bars passengers from challenging the traffic stop if the officer arrests them before exerting any authority under *Wilson*, but would permit passengers to challenge the stop if the grounds for arrest were discovered after the officer gave directions controlling their movements. It is true, as the majority observes, that Fourth Amendment jurisprudence is not free of anomaly. (Maj. opn., *ante*, at p. 18.) However, when given the opportunity, we should eschew incongruity. Surely consistency is preferable to anomaly.

I would hold that passengers are "seized" from the time a car is pulled over until the officer ends the restraint on their liberty, either by telling them they are free to leave or by releasing the occupants of the vehicle after completing the traffic stop. This approach satisfies the majority's concern with determining when a seizure ends. (Maj. opn., *ante*, at p. 16.) It provides a clear and easily applied rule, and imposes no additional burdens on law enforcement. It is consistent with the policy of granting police officers broad latitude to control the movements of passengers during traffic stops. It treats driver and passenger alike, protecting and clarifying their rights and obligations.

The majority contends such a per se rule is inconsistent with Fourth Amendment jurisprudence requiring consideration of all the circumstances of the individual case in determing whether there has been a "seizure." (Maj. opn., *ante*, at p. 16, fn. 4.) However, the *Wilson* court made an express exception to the usual practice of avoiding bright-line rules in the Fourth Amendment context when it decided that passengers, like drivers, may routinely be ordered to leave the vehicle during a traffic stop. (*Maryland v. Wilson*, *supra*, 519 U.S at p. 413, fn. 1.) The

per se rule of *Wilson* justifies the rule proposed here. Because, as a matter of law, passengers' freedom of movement is subject to the control of the officer during a traffic stop, passengers should be permitted as a matter of law to challenge the legality of the stop. No conflict with the body of Fourth Amendment law arises from this commonsense approach. Further, the analysis takes into account the most relevant circumstance: the passengers' freedom has been limited by the officer's exercise of authority.

The majority expresses concern about unduly expanding the reach of the exclusionary rule. (Maj. opn., *ante*, at p. 18.) However, no evidence discovered during the course of a legally justified traffic stop would be affected if we held that passengers are seized along with drivers. The majority acknowledges that most jurisdictions have accepted that rule, and the weight of authority on this point is indeed substantial. Eight of the federal circuit courts of appeal hold that passengers are detained during a traffic stop.[4] There are no cases on point from the other four circuits. Twenty-one state courts have adopted the same view.[5] The

---

[4] See *United States v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 5 (characterizing the rule as "doctrinal bedrock"); *United States v. Rusher* (4th Cir. 1992) 966 F.2d 868, 874, footnote 4; *United States v. Grant* (5th Cir. 2003) 349 F.3d 192, 196; *United States v. Perez* (6th Cir. 2003) 440 F.3d 363, 369; *United States v. Powell* (7th Cir. 1991) 929 F.2d 1190, 1195; *United States v. Green* (8th Cir. 2001) 275 F.3d 694, 699; *United States v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *United States v. Eylicio-Montoya* (10th Cir. 1995) 70 F.3d 1158, 1162-1164.

[5] See *State v. Gomez* (Ariz.Ct.App. 2000) 6 P.3d 765, 766; *State v. Bowers* (Ark. 1998) 976 S.W.2d 379, 381; *State v. Hernandez* (Fla.Dist.Ct.App. 1998) 718 So.2d 833, 836; *State v. Cooper* (Ga.Ct.App. 2003) 579 S.E.2d 754, 756; *State v. Haworth* (Idaho 1994) 679 P.2d 1123, 1124; *People v. Bunch* (Ill. 2003) 796 N.E.2d 1024, 1029; *McKnight v. State* (Ind. Ct.App. 1993) 612 N.E.2d 586, 588; *State v. Eis* (Iowa 1984) 348 N.W.2d 224, 226; *State v. Hodges* (Kan. 1993) 851 P.2d 352, 360-362; *In re Albert S.* (Md.Ct.Spec.App. 1995) 664 A.2d 476, 480-481; *State v. Harms* (Neb. 1989) 449 N.W.2d 1, 4-5; *State v. Scott* (Nev. 1994) 877 P.2d 503, 508; *State v. Creech* (N.M.Ct.App. 1991) 806 P.2d 1080, 1082 (but see *State v. Affsprung* (N.M.Ct.App. 2004) 87 P.3d 1088, 1092-1094); *People v. Smith* (App.Div. 1984) 483 N.Y.S.2d 62, 63; *State v. Carter* (Ohio 1994) 630

majority refers to only two states where its analysis is followed.[6] If the results of permitting passengers to challenge traffic stops were crippling to law enforcement, one would expect the practice to be less widely followed. At least one state, Wisconsin, has reconsidered and rejected its former minority view. (*State v. Harris*, *supra*, 557 N.W.2d at pp. 248, 251.) The majority opinion provides no sound basis in reason or policy to depart from the rule followed in nearly all other jurisdictions that have considered the question. California too should grant passengers the same Fourth Amendment rights as drivers during traffic stops.

CORRIGAN, J.

I CONCUR:

WERDEGAR, J.
MORENO, J.

N.E.2d 355, 360; *State v. Scott* (Or.Ct.App. 1982) 650 P.2d 985, 987, and footnote 4 (relying on statute, but noting that Fourth Amendment protected passenger's expectation not to be stopped without reasonable suspicion); *State v. Wilson* (S.D. 2004) 678 N.W.2d 176, 181; *Kothe v. State* (Tex.Crim.App. 2004) 152 S.W.3d 54, 61; *State v. Harris* (Wis. 1996) 557 N.W.2d 245, 251; *Parkhurst v. State* (Wyo. 1981) 628 P.2d 1369, 1374 (relying on state constitution); *State v. Otteson* (Utah Ct.App. 1996) 920 P.2d 183, 185.

[6] See *People v. Jackson* (Colo. 2002) 39 P.3d 1174, 1184-1186; *State v. Mendez* (Wn. 1999) 970 P.2d 722, 729; maj. opn., *ante*, at page 7.

The Delaware courts appear to acknowledge that the majority opinion's view is technically correct, but nevertheless permit passengers to challenge the basis for a traffic stop. (*Jarvis v. State* (Del. 1991) 600 A.2d 38, 41, fn. 1; *Harris v. State* (Del.Supr.Ct. 2002) 806 A.2d 119, 123, fn. 9.)

In *State v. Affsprung*, *supra*, 87 P.3d at pages 1092-1094, the New Mexico Court of Appeals assumed a passenger was not detained at the same time as a driver, and conducted a fact-specific analysis, without referring to an earlier New Mexico case holding that passengers may challenge the grounds for a traffic stop (*State v. Creech*, *supra*, 806 P.2d at p. 1082).

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Brendlin

Unpublished Opinion
Original Appeal
Original Proceeding
Review Granted XXX 115 Cal.App.4th 206
Rehearing Granted

Opinion No. S123133
Date Filed: June 29, 2006

Court: Superior
County: Sutter
Judge: Christopher R. Chandler

Attorneys for Appellant:

Elizabeth Campbell, under appointment by the Supreme Court, and James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Attorneys for Respondent:

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean, Janet E. Neeley, Michael A. Canzoneri and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX B

Court of Appeal, Third Appellate District - No. C040754
S123133

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED
AUG 30 2006
Frederick K. Ohlrich Clerk
DEPUTY

THE PEOPLE, Plaintiff and Respondent,

v.

BRUCE EDWARD BRENDLIN, Defendant and Appellant.

Petition for rehearing DENIED.

Werdegar, Moreno, and Corrigan, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

APPENDIX C

Filed 1/27/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE, Plaintiff and Respondent, v. BRUCE EDWARD BRENDLIN, Defendant and Appellant.	C040754 (Super. Ct. No. CRF012703)

APPEAL from a judgment of the Superior Court of Sutter County, Chris Chandler, J. Reversed.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Bruce Edward Brendlin was the passenger in a car stopped by an officer who had a hunch that the temporary operating permit displayed in the window might not belong to the car and,

65

thus, it was being unlawfully operated as an unregistered vehicle. As a result of the vehicle stop, the officer discovered that a warrant had been issued for defendant's arrest. Searches of defendant and the car revealed evidence of drug offenses.

Following the denial of his motion to suppress evidence (Pen. Code, § 1538.5), defendant entered a negotiated plea of guilty to manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and admitted having served a prior prison term (Pen. Code, § 667.5, subd. (b)). He was sentenced to a term of four years in state prison.

On appeal, defendant claims the trial court erred in denying his suppression motion. We agree. In reaching this conclusion, we reject the holdings in three Court of Appeal opinions which have concluded that a passenger in another person's car cannot contest the validity of a traffic stop of the vehicle. As we will explain, we agree with the majority view that a passenger can challenge the vehicle stop. We further conclude that the stop in this case was unlawful since the facts and inferences therefrom were insufficient to support a reasonable suspicion that the temporary permit was not for that car. Hence, the evidence seized from defendant and the car should have been suppressed because it was the product of the unlawful stop. Accordingly, we shall reverse the judgment.

FACTS

At approximately 1:30 a.m. on November 27, 2001, Deputy Sheriff Robert Brokenbrough saw that a Buick parked in a Circle K market had an expired registration tag. Brokenbrough "ran the plates and they came back expired." Dispatch told him that the expiration date was

September 27, 2001, but that an application was "in process" for renewal of the registration.

Brokenbrough later saw the Buick being driven on Franklin Road. This time he noticed that, in the back window of the car, there was a red Department of Motor Vehicles temporary operating permit with the number "11," representing the month of November. The temporary permit was good until the last day of November 2001.

Based upon his 11 years of experience as a peace officer, Brokenbrough knew that drivers occasionally "remove [such temporary permits] and switch them around on vehicles" in order to avoid fines for expired registrations. Even though there was nothing unusual about the temporary permit on the Buick, e.g., the way it was affixed, to make him believe that it did not belong on the Buick, Brokenbrough "[m]ade a traffic stop" to "verify whether or not that sticker belonged to that vehicle."

Brokenbrough asked both the driver, Karen Simeroth, and the passenger, defendant, to identify themselves. Simeroth handed Brokenbrough her driver's license. Defendant said his name was Bruce Brown; however, from prior contacts, the officer recognized him as being one of the Brendlin brothers, either Scott or Bruce.

Believing that one of the Brendlin brothers was "a parolee at large," Brokenbrough "put Bruce Brendlin's name over the radio." Another officer responded, stating he thought the suspect was "absconding" on parole. When dispatch "confirmed that [defendant]

was a parolee at large," he "was taken into custody at gunpoint."[1] A syringe cap was seized from defendant during a search incident to his arrest. A pat down search of Simeroth revealed that she was possessing two syringes, one without a cap, and a bag containing a green leafy substance. She was placed under arrest.

During a search of the Buick, officers seized various items apparently related to the manufacturing of methamphetamine.

DISCUSSION

In denying defendant's motion to suppress evidence, the trial court found that (1) as just a passenger in the Buick, defendant was not detained until he was arrested when Deputy Sheriff Brokenbrough confirmed that he was a parolee at large, (2) the vehicle stop was lawful because the officer had sufficient cause to believe the car was unregistered, and (3) since defendant was merely a passenger in the Buick, he lacked "standing" to seek suppression of the items seized during a search of the car.

In reviewing a ruling on a motion to suppress, we "defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) "Pursuant to article I, section 28, of the California Constitution, a trial court may

---

[1] Evidence established that, at the request of his parole agent, defendant's parole had been suspended and a no bail warrant had been issued for his arrest.

exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution." (*People v. Banks* (1993) 6 Cal.4th 926, 934.)

Asserting he was detained when Deputy Sheriff Brokenbrough stopped the Buick, defendant claims that the detention which led to the seizure of evidence was unlawful because the facts known to the officer did not give rise to a reasonable suspicion of criminal activity. In defendant's view, he had a reasonable expectation of privacy in the car and, therefore, he had "standing" to challenge its search.

The People retort that defendant "lacks standing to complain about the items seized from the vehicle," and "as to evidence seized from his person, he was not detained until ordered from the car . . . [a]t [a] point [when] the officer had probable cause to detain [him]."

For reasons to follow, we conclude (1) defendant can challenge the stop of the Buick, (2) the stop was unlawful because the facts and inferences therefrom were insufficient to support a reasonable suspicion that the temporary permit was not for the Buick, and (3) the evidence seized from defendant and the Buick should have been suppressed because it was the product of the unlawful stop.

Long ago, the United States Supreme Court emphasized that "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' [Citations.] A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has

not had any of his Fourth Amendment rights infringed. [Citation.] And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment [citation], it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. [Citation.]" (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134, fn. omitted [58 L.Ed.2d 387, 394-395].) Pointing out the "substantial social cost" of applying the exclusionary rule to keep relevant and reliable evidence from the trier of fact, and to deflect "the search for truth at trial," the Supreme Court noted the importance of limiting the class of persons who may invoke the rule. (*Id.* at pp. 137, 138 [58 L.Ed.2d at p. 397].)

Courts used to refer to this question as "standing" to raise a Fourth Amendment violation. However, since *Rakas v. Illinois, supra,* 439 U.S. 128 [58 L.Ed.2d 387]), "the United States Supreme Court has largely abandoned use of the word 'standing" in its Fourth Amendment analyses." (*People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3.) "[T]he better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." (*Rakas v. Illinois, supra,* 439 U.S. at p. 139 [58 L.Ed.2d at p. 398].)

Thus, the issue is whether the defendant "is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." (*Rakas v. Illinois, supra,* 439 U.S. at p. 139 [58 L.Ed.2d at p. 398].) Stated another way, "the question is whether the challenged search or seizure

violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." (*Id.* at p. 140 [58 L.Ed.2d at p. 399].)

There is a split of authority as to whether a passenger can challenge the legality of a traffic stop of the car.

One line of cases holds that a traffic stop constitutes a detention, or seizure, of not only the driver, but of passengers as well. (E.g., *People v. Bell* (1996) 43 Cal.App.4th 754, 765; *People v. Grant* (1990) 217 Cal.App.3d 1451, 1460; *U.S. v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *U.S. v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5; *U.S. v. Eylicio-Montoya* (10th Cir. 1995) 70 F.3d 1158, 1164; *U.S. v. Roberson* (5th Cir. 1993) 6 F.3d 1088, 1091.) The rationale of this majority view (see *People v. Bell, supra,* 43 Cal.App.4th at pp. 761-765) is that everyone in the vehicle is detained because the traffic stop "'significantly curtails the "freedom of action" of the driver and the passengers . . . .'" (*Id.* at p. 761, quoting *Berkemer v. McCarty* (1984) 468 U.S. 420, 436 [82 L.Ed.2d 317, 332]; see also *People v. Grant, supra,* 217 Cal.App.3d at p. 1458 [a passenger's "personal liberty and freedom of travel are intruded upon by" the stop]); *U.S. v. Twilley, supra,* 222 F.3d at p. 1095 [a "passenger's interests are affected when [the] vehicle is stopped"]; *U.S. v. Kimball, supra,* 25 F.3d at p. 5 ["a stop affects an occupant's interest in freedom from random, unauthorized, investigatory seizures"].)

Other decisions hold that a routine traffic stop does not subject a passenger to a seizure within the meaning of the Fourth Amendment. (E.g., *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373-1374; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1367-1369; *People v. Fisher* (1995) 38 Cal.App.4th 338, 343-344.) The rationale of this minority view is that the traffic stop is intended to restrain the freedom of movement of only the driver; the passenger, whose presence in the car "is merely fortuitous," does not submit to the show of authority and, without more, is free to leave after the vehicle stops. (*People v. Cartwright, supra,* 72 Cal.App.4th at pp. 1367-1368; see also *People v. Castellon, supra,* 76 Cal.App.4th at p. 1374; *People v. Fisher, supra,* 38 Cal.App.4th at pp. 343-344.)

In our view, a common sense application of Fourth Amendment principles leads to the conclusion that a traffic stop constitutes at least a momentary seizure of everyone in the car. Certainly, it must be said that the freedom of action of the passenger, as well as the driver, is significantly curtailed by an officer's act of making the driver stop the car. (See *California v. Hodari D.* (1991) 499 U.S. 621, 625-626 [113 L.Ed.2d 690, 697] [a "seizure" within the meaning of the Fourth Amendment occurs when a person yields to an officer's use of physical force, or show of authority, and the person's liberty is actually restrained in some way].) Whether a passenger remains detained thereafter depends on whether, under the circumstances, a reasonable person would feel free to leave while the officer deals with the driver. (*United States v. Drayton* (2002) 536 U.S. __, __ [153 L.Ed.2d 242, 251].) But the

fact remains that, at the time of the initial traffic stop, the passenger is seized within the meaning of the Fourth Amendment. (See *California v. Hodari D., supra,* 499 U.S. at pp. 625-626 [113 L.Ed.2d at p. 697].) By no stretch of the imagination can it be said that the passenger is free to go from the point at which the driver yields to the officer's show of authority and the time that the seizure occurs when the car actually stops.

Consequently, although a passenger who asserts no property or possessory interest in the car "would not normally have a legitimate expectation of privacy" in the vehicle in order to contest its seizure and search (*Rakas v. Illinois, supra,* 439 U.S. at pp. 148-149 [58 L.Ed.2d at p. 404]), the passenger can challenge the legality of the traffic stop because the passenger is asserting his or her own legal right to be free from an unlawful seizure. (See *Berkemer v. McCarty, supra,* 468 U.S. at p. 436 [82 L.Ed.2d at p. 332]; *Colorado v. Bannister* (1980) 449 U.S. 1, 4, fn. 3 [66 L.Ed.2d 1, 4]; *Delaware v. Prouse* (1979) 440 U.S. 648, 653 [59 L.Ed.2d 660, 667].)

So it is in this case. As a passenger in the car stopped by Deputy Sheriff Brokenbrough, defendant can challenge the legality of the stop.

According to defendant, the stop was unlawful because "there were no facts to support [a reasonable] suspicion the Vehicle Code was being violated." We agree.

"An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." (*United States v. Cortez* (1981)

449 U.S. 411, 417, fn. omitted [66 L.Ed.2d 621, 628]; *People v. Souza* (1994) 9 Cal.4th 224, 231.) In other words, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, [objectively] warrant [a reasonable suspicion that the suspect is, or is about to be, engaged in a crime]." (*Terry v. Ohio* (1968) 392 U.S. 1, 21 [20 L.Ed.2d 889, 906].) Such facts may include a "consideration of the modes or patterns of operation of certain kinds of lawbreakers." (*United States v. Cortez, supra,* 449 U.S. at p. 418 [66 L.Ed.2d at p. 629].) "The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*People v. Loewen* (1983) 35 Cal.3d 117, 123.)

Here, the only basis for the traffic stop was Deputy Sheriff Brokenbrough's belief that the Buick's driver might be operating the car in violation of Vehicle Code section 4000, which provides in pertinent part that no person shall drive upon a highway, including a public street, any motor vehicle "unless it is registered and the appropriate fees have been paid . . . ." But the facts known to the officer did not warrant a reasonable suspicion of such criminal activity. Before stopping the vehicle on November 27, Brokenbrough ran a check on the registration and was informed that it had expired but that an application was in process to renew the registration. Also before stopping the vehicle, he observed that a temporary operating permit with the number 11, representing the month of November, was in the back window. Although the temporary permit

was good until the end of November and authorized defendant to drive the Buick on a public street (Veh. Code, § 4606), Brokenbrough knew from past law enforcement experience that some drivers "remove [temporary permits] and switch them around on vehicles" in order to avoid fines for expired registrations. However, he did not see anything unusual about the way the temporary permit was affixed to the Buick which would lead to the conclusion that it did not belong on the car. Indeed, he knew a registration renewal was in process for the Buick, which indicated the temporary permit was issued for it. Nevertheless, Brokenbrough stopped the Buick to verify whether the temporary permit was issued for that vehicle.

Because Deputy Sheriff Brokenbrough had at most a hunch that the driver of the Buick was operating an unregistered vehicle in violation of Vehicle Code section 4000, he acted unreasonably and unlawfully in stopping the vehicle for the purpose of determining whether the temporary operating permit belonged to the Buick. (Cf. *People v. Butler* (1988) 202 Cal.App.3d 602, 606-607 [an officer may not stop a vehicle simply for the purpose of determining whether its windows "were made of illegally tinted, rather than legally tinted, safety glass"; unless the officer is aware of articulable facts that suggest the tinting is illegal, "the detention rests upon the type of speculation which may not properly support an investigative stop"].)

But for the unlawful vehicle stop, Deputy Sheriff Brokenbrough would not have discovered and seized the evidence against defendant. Consequently, the trial court erred in not suppressing the evidence "under the 'fruit of the poisonous tree' doctrine." (*U.S. v.*

Kimball, supra, 25 F.3d at p. 6, citing *Wong Sun v. United States* (1963) 371 U.S. 471, 484-485 [9 L.Ed.2d 441, 453-454]; *People v. Butler, supra,* 202 Cal.App.3d at p. 607.)

DISPOSITION

The judgment is reversed.

SCOTLAND, P.J.

We concur:

BLEASE, J.

ROBIE, J.

APPENDIX D

FRIDAY, FEBRUARY 8, 2002

--oOo--

In the matter of the People of the State of California versus Bruce Edward Brendlin, Defendant, Case Number CRF-01-2703, came on regularly before the Honorable Ann Rutherford, Judge of the Superior and Municipal Court, for the County of Sutter, State of California, sitting in Department Two.

The People were represented by Susan Green, Deputy District Attorney.

The Defendant, Bruce Edward Brendlin, was personally present and represented by Timothy Warriner, Deputy Public Defender, acting as his counsel.

The following proceedings were then had:

---oOo---

THE COURT: The Court at this time is calling CRF-01-2703; and that is the matter of People versus Simeroth and Brendlin.

Mr. Brendlin, that is Bruce Edward Brendlin, is present with his counsel, Tim Warriner. Karen Sue Simeroth is present with her attorney, Mr. Hansen. And Ms. Green is appearing for the People.

Looks like -- I got this file transferred over to me at the lunch break, and I had the opportunity to take it with me and read the motion at lunch. We have a motion to supress and the People's motion to continue the jury trial which is set for the 13th. What I have is I have Mr. Warriner for Mr. Brendlin with a motion to supress.

I don't have a motion to supress from Mr. Hansen on behalf of Ms. Simeroth; is that correct?

BEST AVAILABLE COPY

MR. HANSEN: It is my intention to move to join in.

THE COURT: To join in. Okay.

Do you want to take up the motion to continue first?

MS. GREEN: No.

THE COURT: You want to take up the motion to supress first?

MS. GREEN: Yes; although, I do have an objection to his joining, because the People haven't been given notice.

If we get to the point where we're going to litigate the traffic stop, I don't have a problem with him joining at that time. It's my understanding that's all he's joining on.

I'm not objecting to the cavity search of Ms. Simeroth; but my objection stands until and unless we get to the point where we litigate the traffic stop.

THE COURT: Okay. Is what you're interested in the traffic stop?

MR. HANSEN: Yes.

THE COURT: Number one, can we all stipulate that there was no search warrant?

MS. GREEN: There was no search warrant.

THE COURT: So we can stipulate to that?

MS. GREEN: Yes.

THE COURT: We don't have to put on evidence there was no search warrant?

MS. GREEN: Yes. There was an arrest warrant --

THE COURT: I understand that.

MS. GREEN: Okay.

THE COURT: At least I expect I will understand that, let's put that it way.

Next on the list we have an objection to standing on behalf of your client, Mr. Warriner. You have a list of items you want supressed. And the People require that you put on some evidence of your right of privacy and are interested in the items.

MR. WARRINER: I think there's no search warrant. I think it's the People's burden at this point to justify the search where there is no warrant. So I think that is the People's burden.

And if the Court -- in terms of standing, one, we have one defendant who's joined in on the standing issue, so I think it becomes a moot point at this point.

In any event, there are cases that support I do have standing. None of these cases are Third District cases; I checked all of them. There's no case from the Third District that says that I have standing. There's no case from the Third District that says I don't have standing. People versus Bell says I have standing. People versus Grant says I have standing, and People versus Lineburger, the Nineth Circuit, concludes I have standing.

THE COURT: You don't want to rely on the Nineth Circuit.

MR. WARRINER: Well, we won't talk about that too much. Well, the one that counts says I do have standing. Ms. Green, she found Cartwright.

THE COURT: How do you supress something you have no interest in?

MR. WARRINER: Well, People versus Bell and Grant and Lineburger say that the passenger in a vehicle, when there's a traffic stop made that is not supported by probable cause, they

say that the passenger has sufficient interest to move to supress the evidence.

THE COURT: Supress the stop?

MR. WARRINER: Yes.

THE COURT: Which case are you relying on?

MR. WARRINER: People versus Bell, People versus Grant --

THE COURT: Which page are you on?

MR. WARRINER: This is on the People's response. The People point this out on Page 4 and 5, that Cartwright supports that standing is not always a sure thing when it comes to another passenger. But the People agree that there are other California cases, People versus Bell, Grant and Lineburger that definitely say passengers do have standing.

THE COURT: Only if they're detained.

MR. WARRINER: No; Bell, Grant and Lineburger say passengers have standing if there is a traffic stop without sufficient probable cause.

THE COURT: Ms. Green.

MS. GREEN: He's talking about two different issues. Those cases which he's referring to are talking about the stop. And what the most recent California case says is, a passenger in a car -- which relies on a United States Supreme Court case --

THE COURT: There's a very recent case as I recall.

MS. GREEN: Right. -- is not detained. And that's an issue, about do we have search issues. Nothing was found on his person. So the issue about whether or not he was detained from the stop is different as to whether or not he has standing to suppress anything found in the car, because nothing was found on

him. He doesn't have, the People's position, any standing to supress the lab that was found in the car because he's a passenger.

Also, because he's a passenger, he can't claim he was detained until the officers exerted some force to, you know -- actually, in this case, ordering him out at gunpoint. At that point it wasn't a detention; it was an arrest from the time that they contact him.

MR. WARRINER: I think that Ms. Green is confusing the issues. People versus Bell, Grant and Lineburger say when a passenger in a vehicle is pulled over and there's no probable cause, that person is seized, their body is being seized by the police, okay. And those cases say that a passenger --

THE COURT: I think there are cases that say he can get out --

MR. WARRINER: Well --

THE COURT: He can walk away. The door was open; he could have walked.

MR. WARRINER: Well --

THE COURT: Until the officer said "Stop," he wasn't seized.

MR. WARRINER: He didn't have any choice.

THE COURT: Of course he did; he could have walked away.

MR. WARRINER: Well, Your Honor, Bell, Grant and Lineburger don't hold that way.

THE COURT: Anyway --

MR. WARRINER: Cartwright --

THE COURT: The other problem that I'm trying to get to, you're trying to supress these items that are listed on your

motion --

MR. WARRINER: Uh-huh.

THE COURT: -- but I don't know what interest you have in them.

MR. WARRINER: I am objecting -- my objection is that this should not have been a stopped vehicle in the first place, because there was no probable cause. So whatever was found after that is the fruit of the poisonous tree.

THE COURT: I must be missing something. I think you have to put on evidence that you have an interest in the things you wish to supress, as to your client.

MR. WARRINER: He has -- my client has an interest in not being seized, not being pulled over by the police.

THE COURT: That's to supress his arrest.

MR. WARRINER: No, that's to supress the traffic stop of the vehicle. If there was no stop, there can't be any arrest, there can't be any evidence, because the vehicle would have gone on about its business. So I think everything hinges on the validity this traffic stop.

THE COURT: Do you want to go ahead and let him get to the traffic stop and see where it goes from there?

MS. GREEN: First I would like a ruling that his client was not detained as a result of the traffic stop because he was a passenger.

THE COURT: I'd have to hear some evidence to know he wasn't detained. As I understand it, I don't think he was detained until the officer pulled the gun and also said, "You're under arrest, I abscond you."

MS. GREEN: I'm not going to -- with him before I'm required to put on any evidence.

MR. WARRINER: She just stipulated, and I'll ask the Court to take judicial notice --

THE COURT: She stipulated there was no search warrant. She did not stipulate there was no arrest warrant.

MR. WARRINER: I obviously want to put on evidence. I think it's the prosecutor's burden to put on evidence. But the Court understands where I'm coming from, and we have a slightly different take on it.

THE COURT: I'll just tell the People to call their first witness.

MS. GREEN: Okay.

THE COURT: We'll determine when he got seized.

MS. GREEN: And my objection --

THE COURT: I'm going to hold your objection, pending to ruling.

MS. GREEN: Thank you.

THE COURT: I'll listen to the testimony and I'll make a finding as to if he was seized if ever and as to what --

MS. GREEN: Okay. We would call Deputy Brokenbrough.

THE COURT: Thank you, Ms. Green.

OFFICER ROBERT BROKENBROUGH,

a witness called by the People, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MS. GREEN:

Q. Would you state your full name and spell your last name for the record.
A. Robert Charles Brokenbrough, B-R-O-K-E-N-B-R-O-U-G-H.
Q. What is your occupation, sir?
A. Deputy sheriff.
Q. For Sutter County?
A. Correct.
Q. Were you working on November 27th of 2001?
A. Yes, I was.
Q. Do you recall where you were at approximately 1:40 a.m.?
A. Yes.
Q. Where were you?
A. Would have been on Franklin, right around south Barrette.
Q. Okay. Were you traveling with anybody -- or were you in a patrol car?
A. Yes, I was.
Q. Was anyone else with you?
A. Yes.
Q. Who was with you?
A. That would have been Cadet Janessa Taber.
Q. And at some point around that time was your attention drawn to a 1993 brown Buick Regal?
A. Yes, it was.
Q. Would you tell me about that, please?
A. Yes. The vehicle was also traveling in front of me. It was eastbound on Franklin. I saw that the registration had expired as of November; and in addition, there was also a temporary DMV sticker in the window.

Q. When you said that the registration had expired, what exactly were you looking at on the vehicle to come to that conclusion?
A. The tab on and the year on the license plate itself.
Q. There was a month tab?
A. Yes.
Q. Do you recall what year the month was for?
A. Nine.
Q. Would that relate to the month of September?
A. Yes.
Q. Was there a year on the vehicle?
A. Yes.
Q. What year tab was there?
A. It was red and it was 01.
Q. Okay; and that would relate to 2001?
A. Correct.
Q. Then you had indicated that you saw something in the window?
A. Yes.
Q. What did you see in the window?
A. A paper, a red-colored temporary sticker in the window.
Q. Okay. Are you familiar with the item you saw in the window?
A. Yes.
Q. And what did you think it was?
A. I'm sorry; can you --
Q. Did you know what the item was or did you think it was something?
A. Yes; it's a temporary sticker from DMV.
Q. And was there a number reflected on that sticker?

A. Yes, there was.
Q. And what was it?
A. 11, for November.
Q. Does that correspond to a particular month?
A. Yes.
Q. Was that November?
A. Yes.
Q. What did you do after observing these two things on the vehicle?
A. Made a traffic stop on the vehicle for the vehicle being expired.
Q. When you made the traffic stop did the vehicle stop?
A. Yes.
Q. Did you get out of your car?
A. Yes.
Q. Did you approach the vehicle?
A. Yes.
Q. What side did you approach?
A. On the driver's side.
Q. Did you contact the driver?
A. I did.
Q. Who was the driver?
A. A female, Karen Simeroth.
Q Do you see that person in the courtroom today?
A. I do.
Q. Would you please point her out and describe what she's wearing and where she is sitting.
A. She's sitting in the jury box, left of her attorney, wearing

the orange sweater and striped pants.

THE COURT: The record will reflect Ms. Simeroth has been identified.

MS. GREEN: Thank you, Your Honor.

Q. Did you notice whether or not there was anyone else in the vehicle besides Ms. Simeroth?

A. Yes.

Q. Was there another person?

A. Yes.

Q. How many others?

A. One other person.

Q. Where was that person?

A. Sitting in the passenger seat.

Q. Did you recognize that person?

A. Yes.

Q. Okay. How did you recognize him?

A. I knew that it was either Scott or Bruce Brendlin from prior arrests or contact that I've had.

Q. Okay. When you spoke with Ms. Simeroth, did you ask her for any type of identification?

A. I did.

Q. What did you ask for?

A. I asked for her driver's license.

Q. Did she provide that to you?

A. Yes, she did.

Q. While you were speaking with Ms. Simeroth, did you have a conversation with the front passenger?

A. Yes.

Q. What did you talk to him about?
A. I asked the passenger to identify himself, and he verbally identified himself as Bruce Brown.
Q. Did he provide you with any type of ID?
A. No.
Q. Do you see the person, this passenger, here today?
A. Yes.
Q. Would you please point him out, describe what he's wearing and where he's sitting?
A. Sitting at the defense table next to his attorney, wearing the orange sweater and striped pants.
THE COURT: The record will reflect Mr. Brendlin has been identified.
MS. GREEN: Thank you.
Q. After you had received Ms. Simeroth's driver's license, what did you do?
A. I put Bruce Brendlin's name over the radio, and I was aware that one of the Brendlin brothers was a parolee at large. Ultimately Officer Baker of the Yuba City Police Department responded back that he believed Brendlin was a parolee at large and was absconding.
Q. And did your dispatch do anything in relation to the name Bruce Brendlin?
A. Yes; I contacted my dispatch and gave them the name Bruce Brendlin, had them check, and immediately they confirmed that Bruce Brendlin was a parolee at large.
Q. Did you also have dispatch check anything with Simeroth?
A. Yes.

Q. What did you have them do with regard to her?
A. Had them check to see if she had a valid license as well as any warrants.
Q. Now, how soon after you contacted Ms. Simeroth in the driver seat did you call to have them check on a warrant for Mr. Brendlin or --
A. Would have been one to two minutes.
Q. Okay. How long after you called dispatch with this request did Brian Baker, the Yuba City police officer, call you back on the radio?
A. As soon as he heard me identify the passenger, he immediately responded that Bruce Brendlin was a parolee at large.
Q. And how long did it take for dispatch to confirm the warrants for you?
A. I would say right around a minute.
Q. During the time that you were waiting for the warrant to be confirmed, did you observe anything with respect to the car doors?
A. Yes.
Q. What did you observe?
A The passenger door opened and then immediately shut.
Q. Was this a two-door car?
A. Yes.
Q. Okay. After you received confirmation from dispatch that there was a warrant for Mr. Brendlin, what did you do?
A. Prior to that -- I requested back up at that point, and Deputy Ramos arrived, and Bruce Brendlin was taken into custody at gunpoint.

Q. Describe for me what you did exactly, please?
A. Withdrew my duty weapon, stood by the passenger door of my patrol car, pointed it in the direction of Bruce Brendlin, and verbally ordered him out of the car at gunpoint.
Q. And was that the first time you issued a command to him during the entire traffic stop?
A. Yes.
Q. Okay. Did you have any other conversation with him prior to that other than asking him what his name was?
A. No.
MS. GREEN: Your Honor, did you want me to just proceed through the rest of the hearing?
THE COURT: I guess so.
MS. GREEN: Okay.
THE COURT: Because to rule on one specific issue as we went, I'd have to do cross-examination.
MS. GREEN: Okay.
Q. You order him out of the car at gunpoint. Where does he -- where do you take him after that?
A. I immediately arrest him and place him in the back seat of the patrol car.
Q. Okay. After you place Mr. Brendlin in the back of the patrol car, what do you do?
A. Do a search incident to the arrest on Mr. Brendlin.
Q. Okay. You searched his person?
A. Yes.
Q. Did you find anything on his person?
A. Yes.

Q. What did you find?
A. Located an orange syringe cap.
Q. I want to jump back in time for a second.
During the time you were speaking with Ms. Simeroth at the driver side door, did you notice anything in the car that -- inside the car that peaked your interest?
A. Yes.
Q. What was that?
A. There was one or two containers of Brayclean (phonetic) cleaner.
Q. And why was that of interest to you?
A. If anything, it just perked my interest because that is something that I understand is used for manufacturing.
Q. Okay. And are you familiar -- you said you were familiar with the Brendlin brothers through prior contacts?
A. Yes.
Q. Were you familiar in particular with Bruce Brendlin's criminal history?
A. I don't know, to be honest with you. I've arrested both of them before. I know that both of them have been associated with either weapons or narcotics.
Q. Okay. After arresting and putting Mr. Brendlin in the back of the patrol car, do you recontact the driver?
A. Yes.
Q. Is she still sitting in the car at this time?
A. Yes.
Q. When you recontact her, do you ask her to get out of the vehicle?

A. Yes.
Q. Okay. What happens next?
A. She exited the vehicle, and I asked her to walk to the front of my patrol car, which she does.
Q. Okay. When you get to the front of your patrol car, what do you do?
A. As I started talking to her, she begins to place her hands in and out of her coat pockets; she's wearing a black bulky jacket.
Q. And do you say anything to her about that?
A. Yes.
Q. What do you say?
A. I asked her if she had any weapons inside her pockets.
Q. And what does she say?
A. "No."
Q. Does she continue -- well, do you direct her to do anything with her hands?
A. Yes, I believe I told her to keep her hands out of her pockets, at which time the hands went back inside the pockets of the jacket.
Q. Now, at the point you're having this conversation with her, who else is on the scene?
A. It would have been Deputy Ramos, Officer Baker and Officer Hansen and Cadet Taber as well as Deputy Emerson.
Q. Deputy Emerson is another Sutter County deputy?
A. Correct.
Q. After you tell her to keep her hands out of her pockets, and she puts her hands back in, what happens next?

A. I asked her again if she had any weapons in her pockets and she replied, "No."
Q. Then what happened?
A. I then proceed to do a pat down search for officer safety.
Q. Describe for me how you began your pat down?
A. I asked Ms. Simeroth to place her hands on top of her head, at which time I grabbed her hands with my left hand and began to do a pat down search with my hand.
Q. What is she doing during the time you're in a pat down search with your hand?
A. Initially she's standing there. As the pat down search progressed, she's moving to the right, away from me.
Q. Okay. Are you directing her to do anything when she's moving to the right?
A. Yes; she was told to stand there.
Q. Did she do that?
A. No.
Q. What did she do?
A. She continues to move to the right to avoid being searched.
Q. Okay. At some point during the time that you're patting her down, does Deputy Emerson direct your attention to something?
A. Yes.
Q. What does he direct your attention to?
A. Deputy Emerson told me from his location he could see something in her waistband.
Q. Okay. Do you attempt to do anything in response to that information?
A. Yes.

Q. What do you do?
A. I proceeded to run my fingertips along her waistband, at which time I felt some type of a bulky object inside of her waistband of her sweatpants.
Q. Okay. What is she doing at the time that you feel something in the waistband of her pants?
A. Still resisting.
Q. How is she resisting?
A. Moving to the side, moving to the right.
Q. Okay. Are you able to retrieve what's in the waistband of her pants?
A. Yes.
Q. How do you do that?
A. She is actually restrained by Deputy Ramos, and ultimately Cadet Taber retrieved the item from her waistband.
Q. Cadet Taber is a female?
A. Correct.
Q. Did you look at the items that were retrieved from her waistband?
A. Yes.
Q. What do you find?
A. Two syringes, one did not have a syringe cap on it, and a plastic baggy containing a green leafy substance.
Q. What do you do at that point?
A. Retrieve those items, and secure her, and place her in handcuffs.
Q. Okay. After arresting her, does she go in one of the patrol cars?

A. Yes.
Q. Okay. Did you search the vehicle?
A. Yes.
Q. Okay. What do you find in the vehicle?
A. There was -- I believe it was either a green- or blue-colored Rubbermaid container. I searched that. Inside that container there was tubing, a scale, and other items. In addition, there was a Nine Lives cat -- either a cat litter container -- it was a plastic container, and inside that was a liquid. And that container was completely sealed with gray duct tape.
Q. The Rubbermaid container that had the scale and the glassware, where was that located in the vehicle?
A. It was on the seat directly between the driver and passenger of the vehicle.
Q. What about the Nine Lives plastic container?
A. Same thing, it was on the seat.
Q. In the Rubbermaid container did you find any tin foil?
A. Yes.
Q. Did you find any filter papers?
A. Yes.
Q. Now, after seeing what was in the Rubbermaid container and the solution in the Nine Lives container, did you request the assistance of somebody?
A. Yes.
Q. And who was that?
A. I requested Net 5 be called out, and ultimately they responded.

Q. Okay. Who's Net 5?
A. It's the Yuba-Sutter local narcotics enforcement.
Q. Okay. So something in this Rubbermaid container and the Nine Lives container led you to believe this was possibly narcotics?
A. Correct.
Q. Did you also search a purse that you located in the vehicle?
A. Yes.
Q. Where was that purse located?
A. The purse was located on the front passenger seat.
Q. And what did you find in the purse?
A. Hypodermic syringe.
Q. Was there any identification in the purse?
A. Yes.
Q. And who was it for?
A. Simeroth.
Q. Prior to the time that you arrested Ms. Simeroth, had you asked her to search the vehicle?
A. Yes.
Q. Okay. And what did she say when you asked her to search the vehicle?
A. I believe I asked her if there was anything illegal inside the vehicle, and she said no, however, she had not been driving it most of the day.
Q. Did she ever answer you yes or no with regard to your question to search?
A. I don't think she did.
Q. At some point did you call dispatch and request that the

registration be run?
A. Yes.
Q. And what information did you receive with regard to that?
A. Dispatch advised that the vehicle was expired as of September 27, '01, with an application in process.
Q. Sometime later did you -- I'm sorry -- strike that.
Deputy Ramos, did he transport Ms. Simeroth to the jail for you?
A. Yes.
Q. Sometime after she was transported to the jail did he provide you with something?
A. Yes.
Q. What did he provide you with?
A. He provided me with a large plastic baggy; and inside this bag was another plastic baggy containing a white powdery substance and another plastic baggy containing a green leafy substance.

MS. GREEN: No further questions.

MR. WARRINER: Okay.

CROSS-EXAMINATION

BY MR. WARRINER:

Q. When you first saw this vehicle you were traveling in your patrol vehicle?
A. Yes.
Q. And you had a cadet with you; is that right?
A. Yes, correct.
Q. You were in a marked patrol vehicle?
A. Yes.

Q. And this had rack lights on the top?
A. Yes.
Q. Okay. And then you basically -- you followed the vehicle that Simeroth and Brendlin were in for some period; is that right?
A. Yes.
Q. Okay. Because you made some observations about the registration tags?
A. Yes.
Q. And you were making those observation as you were following the vehicle?
A. Yes.
Q. And one of the observations you made is that the small tag that's affixed to the license plate was expired?
Is that what you're saying --
A. Yes.
Q. -- that that registration tag was expired?
A. Yes.
Q. Now, you referred to a DMV temporary sticker that you saw, do you recall that?
A. Yes.
Q. Okay. And what that is is a DMV temporary registration sticker; is that true?
A. I refer to it as a DMV sticker.
Q. You don't like to use the word "registration" with that sticker?
A. I'm sure it's probably called that, but I refer to it as a DMV sticker.

MR. WARRINER: Can I approach, Your Honor?

THE COURT: You may.

MR. WARRINER: I'd like to have this marked. I think this is consistent with what is in the Court's packet.

THE COURT: It's actually called a temporary operating permit.

MR. WARRINER: Temporary operating permit, okay.

(Defense Exhibit A was marked for identification.)

BY MR. WARRINER: Q. Okay, Officer, I'm showing you Defense Exhibit A, and I want you to look at that. Do you recognize that?

A. I recognize the temporary sticker and the 11 on it, that's it.

Q. Okay. Is what's depicted in that exhibit that you're looking at, is that consistent with what you observed on the 27th of November, 2001?

A. I would say so. The writing and the date at the bottom, that's unknown.

Q. Okay. And you have seen those stickers before?

THE COURT: May I see that?

THE WITNESS: Yes, Your Honor.

(Pause.)

THE WITNESS: Yes, I have.

BY MR. WARRINER: Q. And -- okay. And you don't use the word "registration"; but basically that sticker has something to do with allowing the vehicle to operate on the roadways and highways of the state, is that true --

A. Yes.

Q. -- when that sticker is given to you?

MS. GREEN: Objection; calls for a legal conclusion.

THE COURT: Sustained.

MR. WARRINER: Okay.

Q. Do you know what that sticker means?

A. My understanding is that when a vehicle is expired, a person can go in to DMV and obtain that sticker, but there is still is other items that need to be taken care of before that vehicle can drive.

Q. So you're saying even if you have that sticker you can't drive?

A. That's my understanding.

Q. Okay. So it is your practice if you saw any car with a sticker like that in the exhibit I've just shown you, and an expired tab on their license plate, you feel that you would be able to pull them over?

A. I believe I would have to verify whether or not that sticker belonged to that vehicle.

Q. Okay. So just looking at the sticker, you're saying that's not good enough, you would actually have to pull them over and conduct a verification?

A. Correct. Based on my experience, over 11 years, with the sticker, its not being a fixed object -- it's paper -- it's tape --

Q. Uh-huh.

A. -- people are -- have been known to remove it to avoid paying penalty fees.

Q. Okay. And so you've seen cases of these removed stickers?

A. Yes.
Q. Have you seen cases of removed stickers such as that sticker shown in the exhibit I've shown you?
A. I'm sorry?
Q. In other words, these temporary stickers. When we're talking about cases of removing stickers, are you talking about these temporary stickers?
A. Yes. People have removed stickers to avoid paying penalties, yes.
Q. What about the little sticker, the license plate tab, do people remove those and switch them around on vehicles?
A. They do.
Q. There's no difference between that little sticker and this temporary sticker in the Defense exhibit I've shown you; is that right?
A. If I understand your question correctly, people will put false tabs on license plates.
Q. Right.
A. They will put false temporary stickers in a window, okay.
Q. Right.
A. Whether it's the case in this case, I don't know.
Q. And when you were traveling down the road, and when you were traveling behind the vehicle that Brendlin and Simeroth were in, you didn't know if in fact that temporary sticker was a false sticker?
A. That's correct.
Q. And did you -- I mean, there was nothing about the sticker, the way it was affixed in the vehicle that made you suspect that

it was wrongfully placed in the vehicle? Was there anything unusual about the sticker, the way it was placed on the vehicle?

A. No.

Q. Okay. You didn't see it peeled away or if it was put up sort of haphazardly?

A. It's also 1:30 in the morning or so, so, yes.

Q. Okay. So 1:30, at that time, that has significance for you?

A. It's dark outside; so therefore, it was unlike daylight, where your advantage of seeing the sticker would be a lot better.

Q. Okay. Yeah, right.

Given the conditions at 1:30 in the morning, it wasn't that light, you didn't see anything to make you think that sticker shouldn't have been on the vehicle?

A. Correct.

Q. All right. And then you were traveling down the road, and you're observing the sticker, and there's some point where you put on your rack lights; is that right?

A. My overheads, yes.

Q. Overhead lights?

A. Yes.

Q. And do you put on a siren, too?

A. No.

Q. Okay. You put on your overhead lights and that's when you effect this traffic stop with the vehicle?

A. Yes.

Q. This is just on a street here in town; is that right?

A. Yes.

Q. Okay. And do you pull up behind the vehicle or on the side

of the vehicle?
A. Behind the vehicle.
Q. And when you pull up behind the vehicle you still leave your lights on; is that correct?
A. Correct.
Q. And do you -- at that point do you run the license plate -- do you radio that license plate in to dispatch so they could do a check on the license plate?
A. No.
Q. Did you do anything like that immediately when you stopped the vehicle?
A. Yes. The plate was ran, yes.
Q. So that's pretty much standard operating procedure, right, if you stop somebody you're going to radio in their license plate to dispatch so you have this check going on them?
A. Yes.
Q. And you did that?
A. Yes.
Q. That takes a few seconds. How long does it take, what do you?
A. Depends on how busy dispatch is.
Q. Sure. Do you recall in this case what you did when you radioed that information in?
A. No.
Q. But that occurs after you stopped the vehicle, the vehicle in front of you. And then you make this radio call; is that right?
A. No.

Q. No. It happened as you were -- when did it happen?
A. An unknown time before the actual stop itself. Originally the vehicle -- I saw the vehicle at Circle K.
Q. Okay.,
A. The vehicle was parked at a pay phone. I didn't see the occupants. I ran the plates and they came back expired. At that time my partner and I did something else; and ultimately while we were traveling on Franklin Road, the vehicle was in front of us.
Q. Okay. So it sounds like you ran the plate some time ago basically?
A. Yes.
Q. This was at Circle K?
A. Yes.
Q. Was there something about the vehicle that caught your eye at Circle K?
A. The expired tags on the vehicle.
Q. Okay.
A. At that point I didn't see the temporary sticker.
Q. Okay.
THE COURT: Dispatch had already radioed you back before you ever saw the car the second time, that the registration was expired?
THE WITNESS: That is correct.
THE COURT: Okay.
BY MR. WARRINER: Q. But at the time you pulled the vehicle over, at that point you had seen that red tag; is that right?
A. Yes.
Q. When we refer again to that exhibit in front of you, and

also to your recollection, it had Number 11 on the vehicle you pulled over; is that right?

A. Yes.

Q. That 11 refers to a month?

A. Yes.

Q. Yes. That would mean for the eleventh month, November, that that vehicle could operate? Is that your understanding?

A. I don't know if there is an ending date, if there is a specific date within that month.

Q. Right; but your understanding is that the 11 means a month?

A. That's correct.

Q. And if it were -- if the month were -- if it were December, and you had a temporary sticker that had 11 on it, what would you think?

A. I'm sorry?

Q. Okay. Let's say this happened in December. Okay?

A. Okay.

Q. And if you ran upon a vehicle that had a temporary sticker with the number 11 on it --

A. Okay.

Q. -- what -- how would you treat that situation?

A. That it would be expired.

Q. Okay.

THE COURT: For the record, it reads: "This permit expires on the last day of the month indicated by the bold white number."

MR. WARRINER: All right.

Q. Then I think we got off track; but I was talking about how

you pulled over the vehicle and you put on your lights. Is that what you said, you put on your lights?

A. Yes.

Q. And you said by the time you pulled over the vehicle you had already radioed the license plate into dispatch?

A. Correct.

Q. So you already had this information in your mind?

A. Correct.

Q. So when you had pulled over the vehicle then did you immediately get out of the vehicle?

A. Well, I mean I have to put the vehicle in park; and ultimately, yes.

Q. Sure, within reason.

I'm wondering, did you radio in any other information immediately after you stopped the vehicle?

A. When the vehicle was stopped, either myself or my partner radioed the license plate, the description and the location.

Q. Okay. So that was the second time you radioed in information about this vehicle to dispatch?

A. Correct.

Q. Okay. And then it was after you did that is when you got out of your vehicle and approached the vehicle?

A. Yes.

Q. Now, the partner with you was a cadet?

A. Correct.

Q. Did the cadet stay in your vehicle or did the cadet get out of your vehicle and walk up to the Simeroth vehicle?

A. She did not.

Q. She stayed in the car?
A. She either sat in the car or she was standing by the door.
Q. All right. And when you approached the vehicle, you were parked behind the vehicle?
A. Yes.
Q. And the -- and your flashers were going -- your police lights were going?
A. Yes.
Q. Did you put on your spotlight, that powerful bright light?
A. I did.
Q. And did you use that to effect the stop -- as a way to effect the stop by putting that light on?
A. No.
Q. Okay. But after your vehicle was stopped and Simeroth's vehicle was stopped, then you applied that light; is that correct?
A. Yes.
Q. And is that light -- what was the purpose of applying that light at that time, the vehicle was already stopped?
A. Well, we're talking -- it's 1:30 in the morning, so obviously the spotlight is used so I can see the vehicle.
Q. Okay. So to illuminate this whole area?
A. Correct.
Q. All right. All right. And you were in your police uniform too; we're assuming you were?
A. Yes, with my duty belt.
Q. And you had a gun on, right?
A. Yes.

Q. Did you have your gun drawn?
A. At what point?
Q. Well, I mean we're saying this is at 1:30 in the morning, right?
A. Yes.
Q. And you're approaching the car alone; is that right?
A. Yes.
Q. Did you undo the snap on your holster?
A. No.
Q. Did you have your hand by your gun, you know, as if you were ready just in case something happened?
A. I might have had my hand by the gun.
Q. Okay.
A. I might have even placed my hand on the gun for officer safety; I never know what the driver or occupants are going to do.
Q. Okay. Right. And that's part of your training, because you're being careful when you approach a vehicle because you don't know what's going to happen?
A. Correct.
Q. As you approached the -- driver's side or passenger side?
A. Driver's side.
Q. That was Ms. Simeroth's side?
A. Yes, she was driving the vehicle.
Q. And also, when you pulled the vehicle over, did you ever get on that little speaker -- and I've had officers do that, get on their speaker and say something to you like, "Pull over," or "Stop your vehicle."

A. I didn't.
Q. When you pulled the vehicle over, did you see the occupants in the vehicle doing anything inside the vehicle?
A. No.
Q. Did you make any orders to the occupants of the vehicle, such as "Stay put, Put your hands up," or anything?
A. I did not.
Q. Did you -- did they roll down the window? Was the window rolled down?
A. I don't recall, other than when I approached the vehicle the window was down, I believe.
Q. Okay. Did either -- anyone from the passenger side or driver's side try to open the door or get out of the vehicle?
A. Yes, at one point the passenger door opened.
Q. Okay. And when was that point?
A. After the vehicle was stopped.
Q. Okay. Well, was it after you contacted Simeroth?
A. Yes.
Q. Okay. And was it after you looked and seen that Brendlin might be somebody you might have recognized?
A. Yes.
Q. All right. So then you approach the driver's side; and did you ask the driver for identification?
A. I did.
Q. And did you shine your light into the passenger -- into the compartment of the vehicle?
A. Yes.
Q. And at that point did you radio that information in to

dispatch, the driver's information?
A. NO.
Q. Did you ask for the passenger's information at that point?
A. I asked who the passenger was; he identified himself verbally. I didn't ask for any identification or a wallet or anything like that.
Q. And when you did that you were still on the driver's side of the vehicle?
A. Yes.
Q. Did you ever go to the passenger side of the vehicle and the passenger and ask any questions on that side?
A. No.
Q. No. It was all done through the driver's side?
A. Yes.
Q. Didn't you eventually go over to the passenger side because you got Mr. Brendlin at --
A. Yes, after it was confirmed he was a parolee at large, he was ordered out at gunpoint and ultimately taken into custody at that time.
Q. I asked a question about the gun. You didn't -- there was a point that you learned he apparently had a warrant; that's when you used the gun at gunpoint?
A. That's correct.
Q. You didn't bring the gun out before then?
A. Did not.
Q. Okay. After you asked Ms. Simeroth for her identification, what did you do immediately after that, do you recall?
A. Identified who the passenger was, obtained his name --

Q. Okay.
A. -- and ultimately walked back to my patrol car.
Q. Why did you walk back to your patrol car as opposed to staying there with the occupants of this vehicle?
A. To run the information that they provided.
Q. And you were going to run it in your computer that you have in your car?
A. No, our vehicle is not equipped with --
Q. I guessed so. But you were going to radio it back in to dispatch?
A. Correct.
Q. You went back, sat in your car, and you radioed this information in?
A. No, actually I stood at the rear of my patrol car or -- at the rear of -- or at the passenger door of my patrol unit, and that's when it was radioed in.
Q. And this whole time while you're doing this the red lights are going on your police vehicle?
A. Correct.
Q. And the large -- what is that called, the bright light?
THE COURT: Spotlight.
MR. WARRINER: Spotlight.
Q. That's on as well?
A. Yes.
Q. And then -- so you radioed this information in. And did you get a response back from dispatch?
A. Yes, eventually.
Q. Once you got that response what did you do?

A. I was told Brendlin was the parolee at large, and he was taken into custody.

Q. Okay. From the point where you asked Ms. Simeroth for her identification and asked Mr. Brendlin to identify himself, to the point where you learned that Mr. Brendlin had a warrant for his arrest, approximately how much time went by?

A. A couple minutes.

MR. WARRINER: All right. No further questions.

THE COURT: Mr. Hansen.

MS. GREEN: Oh, sorry.

THE COURT: He's interested in the traffic stop.

CROSS-EXAMINATION

BY MR. HANSEN:

Q. Deputy Brokenbrough, you said you saw this vehicle at Circle K?

A. Correct.

Q. What time of day was that?

A. I don't remember offhand.

Q. The same evening?

A. Yes.

Q. Hours before?

A. Yes.

THE COURT: Was it already dark when you saw it at Circle K?

THE WITNESS: Yes, it was. Yes.

BY MR. HANSEN: Q. And you saw the license -- the license plate and sticker on the license plate at that time?

A. Yes.

Q. And you did not see the red sticker with the 11 on it at

that time?
A. I did not.
Q. Where was the sticker, the red sticker with the 11 on it, placed in the car?
A. It was placed on the back windshield.
Q. Windshield?
A. The rear window of the vehicle, at the -- I want to say the driver's side, lower corner.
Q. Do you have any knowledge of what the Vehicle Code requires for placement of a sticker like that?
A. I don't.
Q. Do you know if it has to be any particular location on the car?
A. My understanding is that it has to be either on the rear window or the front windshield, visible.
Q. And it was on the rear window?
THE COURT: When you say rear window, I don't know what you mean; like the rear passenger window, rear driver window?
THE WITNESS: The back of the car, the back window of the vehicle.
THE COURT: The back?
THE WITNESS: Yes.
THE COURT: Okay. Like the rear windshield or whatever you want to call it. Okay, thank you.
BY MR. HANSEN: Q. The window in the back that goes from side to side?
A. Yes.
Q. Above the trunk?

A. Yeah.

THE COURT: So the one that doesn't open?

THE WITNESS: That's correct.

BY MR. HANSEN: Q. And that's where the sticker was?

A. Yes.

Q. Now, the license plate was also on the back of the vehicle, wasn't it?

A. Yes.

Q. So when you're looking for the first time and seeing this license and getting the information off it, why couldn't you see the red 11 sticker?

A. I don't know, other than from the way the car was positioned, the way it was parked. What caught my -- initially caught my eye was the color of the year. And with that being an expired tab, that caught my attention. At that point I ran the plate, I didn't see the sticker.

Q. Okay. The color of the year, that wasn't expired yet, was it? It wasn't a 2001 sticker?

A. It was '01, but it was also September. Since we were in November --

Q. But the year was okay?

A. Yes.

Q. But you say there was a September sticker on it?

A. Yes.

Q. So you ran that information. And it came back expired?

A. Yes.

Q. And you got some additional information besides the fact it was expired, didn't you?

A. Yes.
Q. And what was that?
A. Application in process.
Q. And was that the only thing you were told, application in process?
A. Besides the registered owner -- I don't know if I understand the question.
Q. What did the application in process mean to you?
A. To me that means that there are still other things that are needed to lawfully drive that vehicle.
Q. And it was not your understanding that the type of sticker represented by the red sticker with 11 on it gave permission to a person to drive that vehicle?
A. It very well may, but I still need to verify whether that sticker belongs to that vehicle.
Q. Who said that?
A. I don't know who said it; but with my experience, knowing that people will avoid paying, you know, registration -- they will affix the false sticker tab to avoid paying penalties, whatever the case may be.
Q. When you saw the vehicle you said there were no people around at that time?
A. I didn't see anyone.
Q. Had you seen the vehicle before that time?
A. No.
Q. Did you know Ms. Simeroth?
A. I don't think I've had any contact with her.
DEFENDANT SIMEROTH: You have.

MS. GREEN: For the record, that was Defendant Simeroth.

THE COURT: Thank you.

BY MR. HANSEN: Q. When you saw the vehicle later, could you clearly see the sticker with the 11 on it?

A. Yes.

Q. So you knew it was there at the time you were following it?

A. Yes.

Q. You said you called the information in again?

A. That would have been sometime after the fact.

Q. All right. So as you're following the vehicle, it's before you stop, but you don't call it in again?

A. Correct.

Q. You didn't call in to ask dispatch if it was a temporary license by virtue of the tag with the number 11/00 on it?

A. Correct. I went on what dispatch had told me earlier.

MR. HANSEN: I don't have any other questions.

REDIRECT EXAMINATION

BY MS. GREEN:

Q. When you ran the car at Circle K, dispatch informed you that it was expired, application pending?

A. Yes.

Q. Is there something about the information that was provided to you at that time -- did they provide you the name of the registered owner at the time you ran the car?

A. Yes.

Q. Who did they tell you was the registered owner?

A. Gail Tonner or Gail Tonner.

Q. When dispatch came back with that information did you

recognize that name?

A. Yes.

Q. How did you recognize it?

MR. WARRINER: Objection; hearsay.

THE COURT: I'll overrule it.

BY MS. GREEN: Q. Have you had some personal contact with Gail Tonner?

A. Yes.

Q. Tell me about it.

A. When I was assigned to detectives, I had investigated where she was a victim of a theft of a handgun.

Q. Okay. So when they came back with the registration information, expired, application pending, and gave you the owner's name, you were kind of like, oh, I know who that is?

A. Yes.

Q. Was it 11 years you've been a police officer?

A. Over 11 and a half.

Q. Okay. In your experience, have you known -- have you, in your experience as a police officer, known that temporary tags, the ones we're talking about in the rear window, have been stolen out of people's cars?

A. Yes.

Q. And people report them as being stolen?

A. Yes.

Q. That's also true of this tab you put on your car or license plate?

A. Yes.

Q. Have you had experience with people falsifying those rear

window stickers?
A. Yes.
Q. Like making them up?
A. Yes.
Q. Okay. Have you -- do you have any experience with people having expired -- like it matches their car but it's from like two years ago, in the window?
A. Yes.
Q. Okay. The temporary tag that's stuck in the back of the window, how are those put back in the window, do you know?
A. I'm assuming with tape.
Q. Okay. So you're familiar with registration tabs that you put on the license plate?
A. Yes.
Q. And those come self-sticky from the Department of Motor Vehicles when they're mailed to you?
A. Correct.
Q. That's different from the tags that you put in the back of the window?
A. When we're talking about tabs, tabs have some type of adhesive that sticks to the plate; therefore, when those are removed, whatever the case may be, there's usually some type of evidence.
Q. They're also pretty sticky aren't they?
A. Yes.
Q. Hard to get off?
A. Yes.
Q. Do you have that photograph in front of you there? If I

could see that.

(Pause.)

BY MS. GREEN: Q. Showing you Defense Exhibit A, there's some writing on this, I'd like you to read to me what's written on that tag, starting with "fees."

A. "Fees to register this vehicle or vessel have been made to the State of California, Department of Motor Vehicles. This permit must be supported by either, one, a Department receipt or -- the receipt number and the receipt number shown on this permit must agree; or 2, a letter issue used by the Department confirming the issuance thereof of a permit."

Q. In the back window -- did you see a receipt taped to the back window?

A. No.

Q. Did you see a letter from DMV taped on the back of the window?

A. No.

Q. Would those be items you could see from your patrol car when you're driving behind the vehicle?

A. Yes.

Q. You could see those items if they were taped on?

A. Yes.

Q. Would you be able to read them from your patrol car?

A. No.

Q. Okay. There's -- also taking a look at Defense Exhibit A, there's an area for license plate number; is that right? There is a blank line where you fill out this information?

A. Yes.

Q. There's also space for an engine number; is that right?
A. Yes.
Q. What's an engine number?
A. That would be the number that's stamped on the engine.
Q. Is that different from a VIN number?
A. I would assume so, but I don't know for sure.
Q. Okay. And there's also an area to write a receipt number -- a blank line; is that right?
A. Yes.
Q. Okay. So prior to the time that you stopped the car, dispatch had informed you that the tags were expired when you ran the license plate; is that right?
A. Yes.
Q. And the information that they provided, you matched the tabs that were on the vehicle; is that right?
A. Yes.
Q. Okay. And then sometime after the stop you ran the vehicle again and it again -- they told you it was expired?
A. Correct.
Q. Now, after you approached the vehicle and you saw Mr. Brendlin or someone you recognized as one of the Brendlin brothers, did that cause you some concern?
A. Yes, only because I knew one of them was a parolee at large; I didn't know which one at that point.
Q. So at the point that you saw him in the vehicle, you had some concern about "parolee at large." Was there anything in particular about -- well, you had previously said that you were familiar with them through weapons and possibly drugs?

A. Yes.
Q. Okay. During the time that you're waiting to have confirmation on the warrant, and the door opens, do you have any concerns then?
A. Yes.
Q. What are your concerns?
A. That he is either going to flee from that location from the vehicle itself --
Q. Okay. When the warrant is confirmed -- strike that.
You said you called for backup before the warrant was confirmed?
A. Yes.
Q. Why?
A. Mainly because I didn't know, number one, if this was the parolee at large; and if it was, I wanted a second unit there.
Q. Okay. So is it fair to say, then, that once you approached the car and recognized the passenger, that the issue about the license plate really became secondary?
A. Correct.
MS. GREEN: No further questions.
THE COURT: Mr. Warriner.

RECROSS-EXAMINATION

BY MR. WARRINER:
Q. I'm having another exhibit marked, which is another exhibit in the Court's -- yeah.
(Defense Exhibit B was marked for identification.)
BY MR. WARRINER: Q. I'm showing you Defense Exhibit B; do you recognize that?

A. Yes.
Q. Okay. What does that look like to you?
A. It's a photograph pertaining to the vehicle I stopped.
Q. And what do you see contained in the rear window?
A. A temporary operating permit with the number 11.
Q. And does that look like it was that night or that early morning when you stopped the vehicle on the 27th of November?
A. Yes.
Q. And -- well, let me see the picture.
And is that in the same location that it was in?
A. As long as it hasn't been moved.
Q. But it looks right to you?
A. Yes.
MS. GREEN: With "location," we're talking about the location of the sticker?
MR. WARRINER: Obviously it's not the vehicle.
MS. GREEN: I wanted to confirm for the record because that's not clear.
MR. WARRINER: Yeah.
Q. And it's true on the night and early morning when you stopped the vehicle there was nothing about the sticker that made you think that that sticker on Defense Exhibit B was stolen?
A. That's correct.
MR. WARRINER: No further questions.
THE COURT: Mr. Hansen.
MR. HANSEN: Yes, briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. HANSEN:

Q. When you saw the car the first time at Circle K, did you go up and look in it?
A. No.
Q. You could have tagged it right then, couldn't you?
A. I could have.
Q. You could have written it and left a citation on the windshield?
A. Yes.
Q. But you chose not to?
A. We either got dispatched to another call -- but got rerouted some how.
Q. And you didn't go up and look at the car?
A. No.

MR. HANSEN: Nothing further.

MS. GREEN: Nothing further.

THE COURT: Okay. You may step down.

THE WITNESS: Thank you.

MS. GREEN: I'd ask that he remain.

THE COURT: Next witness.

MS. GREEN: Cliff Bowman.

CLIFF BOWMAN,

a witness called by the People, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth testified on his oath as follows:

DIRECT EXAMINATION

BY MS. GREEN:

Q. Please state your full name and spell your last name.
A. Clifton Bowman, B-O-W-M-A-N.

Q. Would you spell Clifton?
A. C-L-I-F-T-O-N.
Q. Sir, what is your occupation?
A. Dispatch.
Q. For the Sutter County Sheriffs' Department?
A. Sutter County Sheriff's Department.
Q. Were you working on November 27, 2001?
A. Yes.
Q. And do you recall a time when Deputy Brokenbrough called into dispatch and requested that you check on whether or not a particular person was a parolee at large?
A. Yes.
Q. That person being Bruce Edward Brendlin?
A. Yes.
Q. Okay.

MS. GREEN: Your Honor, I have a document that I'd like marked as People's 1.

(People's Exhibit 1 was marked for identification.)

BY MS. GREEN: Q. What do you do -- what did you do in response to Deputy Brokenbrough's call, in response to whether or not there was a warrant?
A. Called the Department of Corrections.
Q. Did you speak with someone at the Department of Corrections?
A. Yes.
Q. What did they tell you?
A. That there was an active warrant.
Q. Do you recall what the warrant was for?
A. Parole violation.

Q. Okay.

THE COURT: For what?

THE WITNESS: Parole violation.

BY MS. GREEN: Q. I'm showing you People's Exhibit 1 for identification.

I'm showing this to counsel first.

Mr. Warriner has already received a copy of it, Your Honor.

Q. People's Exhibit 1 for identification, would you take a look at that document and tell me if you recognize it?

A. Yes.

Q. What is it?

A. It's a copy of a warrant abstract.

Q. Okay. And when you say a warrant abstract, it's a teletype of information, with respect to CDC, of warrants?

A. Yes.

Q. CDC being California Department of Corrections?

A. Yes.

Q. And what -- is this a document that you would be printing at the sheriffs' department?

A. Yes.

Q. Okay. And how do you obtain this information?

A. Via teletype from the Department of Corrections.

Q. Then you print it out while you're working as a dispatcher?

A. Yes.

Q. What does this document tell?

A. It lists the name, physical description and what the violation is.

Q. Okay. And does it indicate that there's a -- was a warrant

for Bruce Edward Brendlin?

A. Yes.

Q. And it was a no bail warrant?

A. Yes.

Q. After you talked to the person at CDC, did you provide that information to Deputy Brokenbrough?

A. Yes.

Q. Okay. And after you print this document, where does it go?

A. To the jail.

Q. And that's when he's booked on the warrant?

A. Yes.

MS. GREEN: No further questions.

MR. WARRINER: No questions.

MR. HANSEN: No questions.

THE COURT: Thank you.

THE COURT: Is this witness excused or do you want him to remain?

MS. GREEN: We can just have him remain.

I'd call Larry Dunn.

LARRY DUNN,

a witness called by the People, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

THE COURT: For the record, unlike most witnesses in Sutter County, I happen to know this witness who was a probation officer in Butte County for a number of years. I have never socialized with him, but he's been there for a number of years before he took whatever job he now has. I did not recognize him in the

hallway.

DIRECT EXAMINATION

BY MS. GREEN:

Q. Please state your full name and spell your last name.

A. Larry Allen Dunn, D-U-N-N.

Q. What is your occupation?

A. State parole agent.

Q. And on November 27th, 2001, were you the parole agent for Bruce Edward Brendlin?

A. Yes.

Q. Are you familiar with him?

A. Yes.

Q. Do you see him in court today?

A. Yes.

Q. Would you point him out, describe what he's wearing and where he's sitting?

A. He's the gentleman that just waved at me that is sitting at the table right in front of me wearing the orange sweatshirt.

THE COURT: Let the record reflect he's been identified.

BY MS. GREEN: Q. I'm showing you People's Exhibit -- Mr. Warriner has a copy of it. I'll show it to Mr. Hansen.

(Pause.)

BY MS. GREEN: Q. Showing you People's Exhibit 2 for identification, would you take a look at that document and tell me if you recognize it?

A. Yes, I do.

Q. What is it?

A. It's an at-large report that I authored and signed off on

November 19, 2001.

Q. What is an at-large report?

A. An at-large report is also referred to as a PAL report.

THE COURT: A what?

A. A P-A-L report, parolee at large. It's a report that I author as a result of an investigation, which is a statement by me that the parolee is avoiding supervision and that his or her whereabouts are unknown. It is also a formal request from me that the Board of Prison Terms suspend parole and issue an arrest warrant.

Q. Did you actually submit that to the Board of prison terms?

A. Yes, I did.

Q. When was that authored?

A. November 9, 2001.

Q. Okay. Showing you what's been marked as People's Exhibit 3 for identification, do you recognize what that documents is?

A. Yes, I do.

Q. What is it?

A. It's a Central Office calendar decision which reflects that the Board of Prison Terms received my report, ordered parole suspended and that a warrant was issued for Mr. Brendlin's arrest, with the last -- his name and CDC number at the bottom.

Q. Was in fact a warrant issued for Mr. Bruce Brendlin for absconding?

A. Yes, ma'am.

Q. You're familiar that that warrant had been entered into the system prior to the time of November 27th, 2001?

A. Yes.

Q. Okay. Showing you People's Exhibit 1 for identification, do you recognize what that is?
A. It's an abstract of judgment -- excuse me -- abstract reflecting the PAL warrant for Mr. Brendlin.
Q. Okay. That's the information that CDC puts in its computer system for law enforcement, with respect to the parolee warrants?
A. Yes, ma'am; the CLETS system on the warrants.
Q. That specifically relates to Mr. Brendlin, correct?
A. Yes.
Q. Does that document tell you when the warrant was entered into the system?
A. Yes, it does.
Q. And when does it say it was entered into the system?
A. November 15, 2001.
MS. GREEN: The People would move items 1, 2 and 3 into evidence, Your Honor.
THE COURT: Any Objection?
MR. WARRINER: No Objection.
THE COURT: Received.
(People's Exhibits 1, 2 and 3 were received in evidence.)
MS. GREEN: No further questions.
THE COURT: Mr. Warriner.

CROSS-EXAMINATION

BY MR. WARRINER:
Q. In regard to Exhibit 3, it says his parole status was suspended as of 10/18/01?
A. Yes, sir.
Q. And so that would mean on November 27, 2001 -- was Mr.

Brendlin patrol status suspended at that time?
A. Yes, sir.
Q. And you're saying that a warrant was issued because of his at large status?
A. Yes, sir.
Q. When it says "suspended," it means that basically -- basically a warrant goes out rather than him continuing to be on parole; is that right?
A. No, sir.
Q. No?
A. No.
Q. Does that mean that your supervision of him is suspended?
A. No, sir.
Q. Okay. But your actively looking for him in order to arrest him at that time?
A. Yes, sir; if I find him, I will arrest him.
Q. Okay. I see. Because there's a warrant in the system?
A. Yes, sir.

MR. WARRINER: Okay. No questions.

MR. HANSEN: No questions.

REDIRECT EXAMINATION

BY MS. GREEN:

Q. With respect to a parolee who is in that suspended status, are they still subject to the same search conditions?
A. Yes, ma'am.

MS. GREEN: No further questions.

MR. WARRINER: No questions.

THE COURT: Does parole suspended simply mean they don't

have the right to be out on parole?

THE WITNESS: It means that the clock has stopped. In probation the terms are a bit different; it would be "revoked." The terms of conditions remain in effect, but the clock is stopped in order to retain jurisdiction.

THE COURT: Okay.

MS. GREEN: No further questions.

MR. WARRINER: No further questions.

THE COURT: Thank you.

THE WITNESS: Yes, ma'am.

MS. GREEN: No further witnesses.

MR. WARRINER: Defense would call Investigator Mark Regan.

MARK REGAN,

a witness called by the Defense, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WARRINER:

Q. Mr. Regan, what is your role in regards to the Brendlin case?

A. I am a licensed provide gather retained by the Sutter County Public Defender's office to work on your behalf for the defendant.

Q. And what is your -- as a private investigator, what is your prior experience for this job?

A. To become a licensed private investigator, you have to have 6,000 hours prior investigating experience to utilize. I was deputy sheriff with the County of Sutter for 11 years, full time;

prior to that, two years.
Q. Okay. And did you perform some tasks in this Brendlin case in regards to this temporary sticker?
A. Yes.
Q. What did you do?
A. I went to Geweke's tow yard at -- gosh, I forget. I think it's 10th and S Street, in that area, where they have a storage facility, and photographed the vehicle.
Q. All right. And how did you know that you were photographing the right vehicle?
A. I compared it to the police report prepared by Officer -- or Deputy Brokenbrough. The license plates matched the vehicle description and the police report matched.
Q. Okay.
A. And eventually the vehicle registration. And it matched all the information in the report and the CLP.
Q. Okay. I'm going to show you Defendant's Exhibits A and B; can you look at those?
A Yes.
Q. Do you recognize those?
A. Yes, I do.
Q. What does Defense Exhibit A depict?
A. A is a photograph that I took of the vehicle -- of the sticker on December 12th, while it was in the storage yard.
Q. Okay. And that's the so-called temporary sticker that's in the rear window of the vehicle?
A. It's a temporary operating permit.
Q. Okay. Temporary operating permit.

I suspect when you took that picture in Exhibit A you were taking it through the glass in the vehicle. How did you take that picture?

A. Without comparing to the other photographs -- I took 10 photographs. I took photographs of the sticker while it was still mounted in the vehicle, as it was when I came upon it, and then I took photographs when we moved it to the back of it, also.

Q. Exhibit B, what does that depict?

A. B is a photograph of the vehicle from which the defendants were arrested and is referenced to in the police report authored -- written by Deputy Brokenbrough.

Q. Did you -- the interior of the vehicle?

A. Very briefly.

Q. Okay. Did you ever find a receipt in the vehicle?

A. I found a DMV receipt, along with the registration.

Q. Where was that found?

A. I believe -- I don't recall if it was in the glove box -- I think -- I believe, if I'm not mistaken, it was on the floorboard or the seat.

Q. And let me show you some photographs. I'm going to have these marked as Defendant's Exhibits C and D. I've shown these to Counsel.

(Defense Exhibits C and D were marked for identification.)

BY MR. WARRINER: Q. Okay. I'm showing you Defendant's C and D. Do you recognize those exhibits, the pictures?

A. Yes, I do.

Q. What is Exhibit C?

A. C is a photograph of the receipt that was attached to the registration in the vehicle.
Q. All right. And what is Exhibit D?
A. D is -- it's a report of deposit of fees for the vehicle and part of the registration and receipts.
Q. And who's the registered owner of the vehicle?
A. This indicates that the registered owner on this receipt is Gail Tonner, T-O-N-N-E-R.
Q. Now, the picture that you took of that receipt, did you confiscate the actual receipt or did you just take that picture?
A. I took photographs and left everything in the vehicle, which was locked.
Q. Let me see Defense A and B again. I'm going to show you Defense Exhibit A. Is there any way you can tell by looking at Defense Exhibit A, and then looking at Exhibits C and D, whether that receipt corresponds to that temporary operating permit?
A. Yes.
Q. How can you tell?
A. The date stamped and numbers on the receipt and dates are -- they correspond, as well as the receipt is stamped "through November," which is consistent with the 11 on the temporary operating permit. Additionally, although not clear in this photograph -- they're designed to fade, these stickers -- is the vehicle license plate and the month and date and other information that DMV puts on these. So they're seen and displayed in the window to match the registration and people paying fees.
Q. Okay. And on these Exhibits C and D, it looks likes

there's -- is there handwriting on there?
A. That's correct.
Q. What does that state?
MS. GREEN: The item speaks for itself, Your Honor.
THE COURT: If I can read it in the picture.
MR. WARRINER: What does it appear --
THE COURT: I'm going to go over it.
THE WITNESS: I'm sorry.
THE COURT: Go ahead.
THE WITNESS: In the -- it says at the top, "And through November," and the initials, VR.
MR. WARRINER: Okay.
THE WITNESS: Did you want to see those?
(Witness handing document to the Court.)
BY MR. WARRINER: Q. When you were with the special detectives -- what years were you with the special detectives?
A. From 1977 through 1988.
Q. When you were with the sheriffs' department did you ever work patrol, where you would drive around in a patrol vehicle?
A. Yes.
Q. Did you ever make traffic stops?
A. Yes, I made quite a few.
Q. Have you ever seen, when you were a police officer, seen temporary operating permits such as that depicted in Exhibit A?
A. Yes, I have.
Q. And to what -- from your law enforcement experience, what is the significance of that sticker?
A That's given to people at DMV while there are certain

deficiencies or things still due in their registration that are not contraindicative to their still operating the vehicle safely, so they don't get stopped by law enforcement.

Q. So if you were a law enforcement officer and you saw a sticker, 11, and it was the 11th month, November, would you feel authorized to stop the vehicle?

MS. GREEN: Objection; relevance.

THE COURT: Sustained.

MR. WARRINER: No other questions.

Actually, I want to move in my exhibits; I'd ask to move all those in.

THE COURT: A B C and D, received.

(Defense Exhibits A, B, C and D were received in evidence.)

Mr. Hansen, any questions?

MR. HANSEN: I have no questions, Your Honor.

THE COURT: All right. Ms. Green.

MS. GREEN: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. GREEN:

Q. Showing you People's Exhibit C --

MR. HANSEN: People's C?

MS. GREEN: Excuse me; Defense evidence C, actually, where did you find that?

A. You know, it was -- I don't recall exactly. It was either in the glove box, on the floorboard or on the seat; I don't recall.

Q. Okay.

A. Of the vehicle.

Q. Defense C indicates that a smog inspection slash certification is required. Do you know what that means?
A. That means they need to take it to a shop to certify that the vehicle is not in violation of the Air Pollution Act and so forth. So it needs a smog certificate.
Q. Were smog certificates required when you were a policeman?
A. I honestly -- I don't remember. I think so.
Q. Do you own a car?
A. Yes, I do.
Q. Do you have to register your car with the DMV?
A. Yes, I do.
Q. Do you know, from your own experience, in order to register your car you have to show proof your car has been smogged, and you have insurance?
A. That's correct.
Q. Now, showing you Defendant's evidence A, there's an area on this that says "receipt number." Would you tell me what the receipt number is.
A. Could you show me where it says that? I need new glasses.
Q. This white type, it says, "receipt number, No.," with a line above it?
A. Yeah.
Q. Can you tell me what number is written on that line?
A. No, in this photograph, I can't.
Q. You can't read it?
A. Not in this photograph.
Q. Okay.
MS. GREEN: No further questions.

THE COURT: Mr. Warriner.

MR. WARRINER: Yeah, just a minute.

REDIRECT EXAMINATION

BY MR. WARRINER:

Q. Okay. I'm going to show you Defense Exhibit A; it looks like there are two numbered photographs. Can you read paragraph number one?

A. My arm's not long enough. The department receipt -- "the receipt number and receipt number shown on this permit must agree."

Q. All right?

A. "Or" --

Q. Just paragraph one.

A. Okay.

Q. And I'm going to show you Defendant's Exhibit D, and I want you to look at the bottom right-hand corner?

A. Okay.

Q. Is there a stamped number on that bottom right-hand corner?

A. There are stamped numbers, yes.

Q. And on Exhibit A -- is there a stamped number on Exhibit A?

A. There are stamped numbers, yes.

Q. Is that the only stamped number on Exhibit A?

A. Correct.

Q. And does that stamp number on Exhibit A correspond to the stamp number on Exhibit D?

A. Yes, it does.

MR. WARRINER: Okay, no further questions.

THE COURT: Mr. Hansen.

MR. HANSEN: No questions.

MS. GREEN: No questions.

THE COURT: All right. Thank you. Next witness.

MR. WARRINER: No other witnesses.

THE COURT: Okay.

Counsel want to be heard?

MS. GREEN: Your Honor, I would still -- the People's position is that Defendant Brendlin was not detained until the time he was ordered out of the car at gunpoint. At that point there was a warrant for his arrest. And I don't think the defense can make a showing that that arrest, not withstanding the warrant, was unreasonable; therefore I'd ask that the motion to be suppressed be suppressed on that grounds.

On secondary grounds, that you find the defendant is a passenger that has no standing with respect to any of the items that were located in the car or in Ms. Simeroth's waistband or in a cavity search that was conducted at the jail. So I'd ask that you deny it on that grounds.

And if the Court doesn't deny it on either one of those grounds, the People would argue that the officer had probable cause to stop the vehicle, at a minimum to inspect whether or not there was a valid registration, number one, as a violation of Vehicle Code Section 4002; to determine whether or not there was a violation of I believe it's 524 -- I'm not sure; I cited it in my brief.

THE COURT: Not having the rights tabs?

MS. GREEN: Not having the right tabs on the car.

The issue isn't whether or not that car was lawfully

registered; the issue is whether or not the officer at the time that he stopped the vehicle had probable cause to believe that a crime may be committed, based on both the information provided to him prior to the stop, where he observed the vehicle at Circle K, and he was informed by dispatch that it had been expired, and with respect to the evidence that is in front of the Court.

Even if that temporary sticker does match that vehicle, it has to be supported by a letter of DMV, and the vehicle's number has to match; and there's no way an officer is going to know that until he stops, contacts the driver and is provided with that information.

MR. WARRINER: Okay. Actually, just to address the last point. It actually says it needs to be supported by the receipt number. It says: "The receipt number shown on the permit must match the receipt number or a letter issue used by DMV. We showed that the receipt numbers match and everything is paid.

THE COURT: I know. How would the officer see it if it was in the glove box or on the floorboard?

MR. WARRINER: The officer -- Your Honor, the officer doesn't need to see it. When you have a sticker like this that says 11, the reason they put that on is so you don't go around and get stopped by officers, so you can drive in peace in this country and not be stopped by officers. That's why they put the big number on there.

So the officer was wrong in stopping this vehicle. That's what we assert. And I don't think the officer had any reason to come up there and investigate this number 11 sticker. He -- the officer admitted on the stand that there was nothing about the

appearance of the sticker that made him think this was one of these stolen or falsified stickers. There's nothing at all. He had absolutely no reason at all to do that.

He obstructed Mr. Brendlin. He detained Mr. Brendlin. Mr. Brendlin has standing. I cited the cases before, which are mentioned in the prosecutor's brief. Those cases say Mr. Brendlin, the passenger, does have standing to address the issue of a traffic stop.

In any event, Ms. Simeroth is joined in the case and she is the driver. And I don't think there's any assertion that she doesn't have standing; and I think in that sense, Mr. Brendlin can take a backseat to her standing. The Court can't supress it against Ms. Simeroth but not to Mr. Brendlin -- I don't think the Court can.

THE COURT: The Court can. You don't have standing.

MR. WARRINER: Well, I respectfully disagree with the Court.

THE COURT: If your right of privacy hasn't been invaded, you have no standing and can't supress anything.

MR. WARRINER: That's not -- those cases say we do have standing.

THE COURT: Okay. Mr. Hansen.

MR. HANSEN: Well, I don't think there's any question of standing as to Ms. Simeroth.

THE COURT: We don't have to worry about that one.

MR. HANSEN: I think the whole point, just as Mr. Warriner has said, is, DMV is giving a big red sticker so they see a vehicle that appears have registration. That's wrong that that wasn't the case. Otherwise, why would they bother putting the

sticker on the car and why would people have to be stopped every time? I don't think that's the intent of the law and I think the officer knew that. He had no reason to stop.

THE COURT: Okay. Number one, this passenger was not detained until the warrant came back and a gun was pointed at him and he was under arrest. That's number one. He was free to leave. And if he had opened the door and got out and taken a hike, then this officer would have had to decide whether he had something less than probable cause to detain him, and then he would have been detained. But he wasn't detained because he never went anywhere; but he had a right to if he wanted to.

Number two, there is a valid stop. This permit is only valid when it is accompanied by a receipt or a letter and that the numbers match. And so I don't have any problem that the vehicle was stopped, especially when the officer had already radioed earlier in the evening and found out that the vehicle was, according to DMV, unregistered, which gave him all the probable cause in the world to wonder where this thing came from, because the car came back unregistered. And of course it was unregistered and it wasn't to be registered until it had its smog.

Next, a passenger does not have standing to supress the items in the vehicle, separate and apart from whether there's probable cause to arrest him or to detain him. So he's put on no standing that he has any interest in any of the items that he seeks to supress, separate and apart from his allegations that he was detained.

I think that's it.

BEST AVAILABLE COPY

MR. WARRINER: Judge, just -- you know, I questioned the officer about the details of his stop and putting on his red lights and the bright light and everything, just to demonstrate to the Court we believe there was a detention.

THE COURT: I know you think there was a detention.

MR. WARRINER: And I think you have to look at it from a reasonable person, what a reasonable person feels, that they're free to go when it's 1:30 in the morning? There's an armed officer approaching the vehicle with red lights and his vehicle parked behind you. I wouldn't get out of the vehicle and walk away.

THE COURT: He felt secure enough to open the door and close it.

MR. WARRINER: So?

THE COURT: He didn't say, "Officer, may I take a hike."

MS. GREEN: Your Honor, with respect to the motion to continue, I would ask that that trail until Monday afternoon. We have a trial readiness conference, and we may be able to enter some stipulations.

THE COURT: Do you want me to continue the motion to Monday afternoon?

MS. GREEN: Yes.

THE COURT: All right. That would be February 11th at 1:30?

MS. GREEN: Yes, we already have a hearing set that day already.

THE COURT: Thank you. Otherwise, the trial -- we're confirming the trial?

MS. GREEN: Correct.

THE COURT: Thank you.

(Proceedings ended.)

--oOo--

(11)

No. 06-8120

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JAN 12 2007
OFFICE OF THE CLERK

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

DONALD E. DENICOLA
Deputy State Solicitor

MICHAEL A. CANZONERI
Supervising Deputy Attorney General

PAUL A. BERNARDINO
(California State Bar No. 164654)
Deputy Attorney General
Counsel of Record

1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Fax: (916, 324-2960

Counsel for Respondent

QUESTION PRESENTED

1. Whether a passenger in a vehicle subjected to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
THE PETITION SHOULD BE DENIED BECAUSE, EVEN IF THIS COURT WERE TO CONCLUDE THAT PETITIONER WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT BY VIRTUE OF THE TRAFFIC STOP, THE EVIDENCE OBTAINED WAS NOT SUBJECT TO SUPPRESSION; THUS RESOLUTION OF THE QUESTION PRESENTED IN THE PETITION WOULD NOT LEAD TO A CHANGE IN THE JUDGMENT	
Introduction	7
Argument	8
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Brown v. Illinois 422 U.S. 590 (1975)	11, 12
New York v. Belton 453 U.S. 454 (1980	11
New York v. Harris 495 U.S. 14(1990)	9, 10
People v. Brendlin 8 Cal.Rptr.3d 882 (2004)	4
People v. Brendlin 38 Cal.4th 1107 (2006)	5
United States v. Ceccolini 435 U.S. 268(1978)	8
United States v. Crews 445 U.S. 463 (1980)	9, 10
United States v. Drayton 536 U.S. 194 (2002)	9
United States v. Green 111 F.3d 515 (7th Cir. 1997)	12
United States v. Johnson 33 F.3d 538 (7th Cir. 2004)	12
United States v. Leon 468 U.S. 897 (1984)	8
United States v. Mosley 454 F.3d 249 (3rd Cir. 2006)	14
United States v. Simpson 439 F.3d 490 (8th Cir. 2006)	12

Page

Wong Sun v. United States
371 U.S. 471(1963) 8

Constitutional Provisions

United States Constitution
Fourth Amendment *passim*

Statutes

California Penal Code §1538.5 3

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-8120

BRUCE EDWARD BRENDLIN

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

STATEMENT OF THE CASE

On November 27, 2001, Sutter County Sheriff's Deputy Robert Brokenbrough observed a vehicle with expired registration tags traveling on South Barrett Road. Petn. Appendix D, RT 12.[1] Deputy Brokenbrough confirmed the expiration of the tags by police radio and also learned that an application for new registration was pending. RT 24-25. While following the car Deputy Brokenbrough saw that there was a temporary operating permit in the rear window with the number "11," representing the month of November. The temporary permit was good until the last day of November 2001.

1. Petitioner included with his petition a copy of the reporter's transcript (RT) of the motion to suppress (petn. Appendix D) the pertinent facts noted herein are taken from that document and are referenced by their RT cite (i.e RT_.)

Deputy Brokenbrough had prior experience with people removing temporary operating permits and switching them around on vehicles in order to avoid fines for expired registration. He felt that he needed to assure himself that the permit actually belonged to the vehicle on which it was displayed. RT 28-29, 45-46. Deputy Brokenbrough "made a traffic stop on the vehicle." RT 14. At the officer's request, the driver identified herself as Karen Simeroth and Petitioner, the front passenger, misidentified himself as "Bruce Brown." RT 15-16.

Deputy Brokenbrough, however, recognized Petitioner and knew him to be one of the Brendlin brothers. He was also aware that one of the Brendlin brothers was a parolee at large. RT 15-16. Deputy Brokenbrough ran a police radio check on Petitioner. The dispatcher informed Deputy Brokenbrough that Petitioner was a parolee at large. RT 16. While obtaining this information, the deputy observed Petitioner open the passenger door but remain in his seat. RT 17. Shortly thereafter, within a couple of minutes from when the deputy asked Simeroth for her license, Deputy Brokenbrough confirmed that there was a warrant for Petitioner's arrest. RT 17.

Deputy Brokenbrough ordered Petitioner out of the vehicle at gun point and arrested him. A search of petitioner's person revealed a syringe cap in his shirt

pocket. RT 18-19. A subsequent pat-down search of Simeroth yielded two syringes and a plastic leafy substance. RT 22. She was then arrested. Following Simeroth's arrest, the vehicle was searched. Inside the car Deputy Brokenbrough found a container, on the front seat between the driver and passenger, containing "tubing, a scale, and other items," later determined to be related to the manufacture of methamphetamine. RT 23.

Following his arrest, Petitioner was charged with multiple counts relating to the manufacture and possession of methamphetamine.

On January 25, 2002, Petitioner filed a motion to suppress evidence pursuant to California Penal Code section 1538.5 on the grounds that his Fourth Amendment rights had been violated.

Following a hearing the trial court denied Petitioner's motion. The court concluded that the traffic stop was not unreasonable; that Petitioner had not been detained until the deputy ordered him out of the car at gunpoint and arrested him on the warrant because petitioner was free to leave once the car was stopped; and that Petitioner lacked "standing" to bring a motion to suppress the items found in the car. RT 70.

Following the denial of his motion to suppress, Petitioner withdrew his previously entered plea and entered a

negotiated plea of guilty to one count of the information. CT 88. On February 11, 2002, Petitioner was sentenced to a negotiated term of four years in state prison. CT 90.

On appeal, Petitioner asserted that the trial court had erred in denying his motion to suppress. The State Court of Appeal agreed. The Court of Appeal held that a passenger is detained within the meaning of the Fourth Amendment when the car in which he is riding is subjected to a routine traffic stop, at least during the actual stopping of the vehicle. *People v. Brendlin*, 8 Cal.Rptr.3d 882, 115 Cal.App.4th 206, 210-211, (2004). The Court of Appeal also concluded the passenger in such a situation may challenge the lawfulness of the vehicle stop. *Id.* at p. 887. The appellate court further ruled that the traffic stop in petitioner's case was unlawful because the facts, and inferences arising from them, were insufficient to support a reasonable suspicion of criminal activity. *Id.* at pp. 887-888. Finally, the Court of Appeal ruled that since all of the evidence seized from Petitioner would not have been discovered but for the unlawful stop it should have been suppressed. Accordingly, the court reversed the judgment against Petitioner. *Id.* at p. 888.

The State appealed and The California Supreme Court granted review. In the California Supreme Court, the State conceded that the traffic stop was not supported by reasonable

suspicion of criminal activity, but argued that Petitioner as a passenger was not seized within the meaning of the Fourth Amendment merely by virtue of the stopping of the car in a routine traffic stop. In the State's view, petitioner was not seized until Deputy Brokenbrough ordered him out of the car at gunpoint and arrested him pursuant to the outstanding warrant. Further the State argued that, even if Petitioner had been unlawfully seized prior to the discovery of the warrant, the evidence against him was properly admissible because it was the product of an intervening lawful search incident to his arrest under the warrant.

The California Supreme Court held that a passenger in a car subjected to a traffic stop whose progress is momentarily stopped as a practical matter is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority. *People v. Brendlin*, 38 Cal.4th 1107, 1123, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006). The court thus concluded that petitioner was not "seized" when the driver submitted to the police officer and brought the car to a stop. The court did not reach the State's argument that the evidence obtained was not sufficiently related to the allegedly unlawful seizure. The court reversed the judgment of the

Court of Appeal. Petitioner's petition for rehearing was denied on August 30, 2006.

BEST AVAILABLE COPY

REASONS FOR DENYING THE PETITION

THE PETITION SHOULD BE DENIED BECAUSE, EVEN IF THIS COURT WERE TO CONCLUDE THAT PETITIONER WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT BY VIRTUE OF THE TRAFFIC STOP, THE EVIDENCE OBTAINED WAS NOT SUBJECT TO SUPPRESSION; THUS RESOLUTION OF THE QUESTION PRESENTED IN THE PETITION WOULD NOT LEAD TO A CHANGE IN THE JUDGMENT

Introduction

This Court should deny the petition because not withstanding the question his petition presents about the privacy rights of a passenger in a stopped car, the challenged evidence in this case was properly admissible in any event because it was not sufficiently connected to the allegedly illegal traffic stop. Regardless of whether Petitioner was detained during the actual stop of the vehicle, he was free to go once the stop had been effectuated. His subsequent arrest and the search of his person and the vehicle were the result of the intervening discovery, during a consensual encounter, of an outstanding arrest warrant supported by probable cause. Thus, the discovery of the challenged evidence was not sufficiently connected to the traffic stop and no evidence was obtained as a result of the allegedly unlawful initial detention of Petitioner.

Argument

In his petition, Petitioner argues that there exists a significant split of authority on the question of whether a passenger in a vehicle subjected to a routine traffic stop is thereby seized within the meaning of the Fourth Amendment. (Petn. at 18-27.) Regardless of Petitioner's argument and as explained in more detail below, this particular case is not an appropriate vehicle to resolve the question presented in the petition. The evidence obtained against petitioner was not, under this Court's precedent, subject to suppression as it was unconnected to the alleged seizure that occurred by virtue of the traffic stop. Resolution of the conflict on the question presented in petitioner's favor would not change the result in his case.

This Court has consistently rejected a rule that would require the suppression of evidence merely because there was a connection between it and a violation of the Fourth Amendment. As was stated in *United States v. Leon*, 468 U.S. 897 (1984) , "[w]e have declined to adopt a per se or 'but for' rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest." *Id.* at pp. 910-911; see also *United States v. Ceccolini*, 435 U.S. 268, 274 (1978); *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963).

The exclusion of evidence somehow connected with a Fourth Amendment violation requires at a minimum a causal connection between the illegal conduct and the evidence sought to be suppressed. As this Court has said, derivative evidence may be suppressed only if it is "in some sense the product of illegal government activity." *New York v. Harris*, 495 U.S. 14, 19, (1990) quoting *United States v. Crews*, 445 U.S. 463, 471 (1980). However once a connection between the evidence and the illegality has been established, the court still must examine the closeness of the connection to determine whether the evidence may be admissible. The test is whether "the chain of causation proceeding from the unlawful conduct has been so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews*, 445 U.S. at 471.

Here, assuming that Petitioner was unlawfully detained during the time the vehicle came to a stop, there was no sufficient connection between that detention and the evidence obtained from his person and the vehicle. Deputy Brokenbrough had no contact with Petitioner and obtained no evidence until after the vehicle had been stopped. At that point, their encounter was consensual. See *United States v. Drayton*, 536 U.S. 194, 204 (2002).

During the course of this contact, Deputy Brokenbrough discovered that Petitioner was a wanted parolee, and based on a warrant supported by probable cause, he arrested Petitioner. Incident to that arrest, Petitioner was searched and a syringe cap was discovered. There is no claim that the arrest of Petitioner or the search incident to that arrest was improper. Thus, the discovery of the syringe cap was not the product of any illegal police action.

This case is analogous to *United States v. Crews*, 445 U.S. 463. Crews was illegally arrested and thereafter the victim identified him in court. Crews asserted that the identification evidence should be excluded because, but for his illegal arrest, he would not have been in court and the victim would not have been in a position to identify him. This Court refused to suppress this evidence, ruling that the evidence was not a product of the illegality: the in-court identification was not occasioned by any exploitation of the defendant's Fourth Amendment rights. *Id.* at pp. 470-471. See also *New York v. Harris*, 495 U.S. 14, 19 (post-arrest statement admissible despite illegal entry because arrest lawful).

In the case at bar, although police would not have discovered the warrant for Petitioner's arrest but for the contact following the traffic stop, the challenged evidence

was the product of Petitioner's arrest and not of that detention. As there is no claim the *arrest* was unlawful, the evidence is not connected to any illegality. *Id.* The evidence was not subject to suppression.

The same analysis applies to the evidence taken from the vehicle. Here, the officers were permitted to search the passenger compartment of the vehicle and any containers found therein pursuant to the lawful arrest of Petitioner. *See New York v. Belton*, 453 U.S. 454, 460-461 (1980). That search uncovered the evidence of methamphetamine manufacturing. The "passenger detention," if such it was, was long over at that point. Thus, the discovery of this evidence was a product of Petitioner's lawful arrest and not a product of any unlawful detention. As such, it was not subject to suppression.

Moreover, even if it could somehow be asserted that the evidence obtained against Petitioner was the product of an illegal detention, nonetheless the evidence was not subject to suppression as that casual chain was sufficiently attenuated. In *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975), this Court set forth the factors to consider in order to determine whether the "taint" of a primary illegality has been sufficiently attenuated: (1) the time between the illegal police conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and

flagrancy of the police misconduct.

Here, two factors strongly dilute any taint. First, a significant intervening factor existed, namely, the valid arrest of Petitioner pursuant to a warrant. Unlike other situations involving allegedly intervening factors, the arrest of Petitioner was not the result of the situation created by the original police illegality. See, e.g., *Brown v. Illinois*, 422 U.S. at p. 605, fn. 12. Rather the arrest was due to prior conduct of Petitioner giving rise to the warrant.

Moreover, the police misconduct, if any, in detaining petitioner was not flagrant. The officer did not know who petitioner was when he stopped the car. The stop was not a pretext to obtain evidence against petitioner. Instead, Deputy Brokenbrough honestly was seeking to ascertain the validity of the car's registration. There is no evidence of bad faith here. And the stop was non-violent and brief. When taken together, the intervening fact of Petitioner's arrest and the lack of flagrancy in the officer's conduct in detaining petitioner are more than sufficient to attenuate any taint of the evidence obtained from the allegedly unlawful detention. See *United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006); *United States v. Johnson*, 33 F.3d 538, 543-545 (7th Cir. 2004); *United States v. Green*, 111 F.3d 515, 521-522. (7th Cir. 1997).

It is true that the evidence was discovered close in time to the allegedly unlawful "passenger detention." But this case is unlike one where the proffered intervening act, such as a defendant's inculpatory statement or his consent to search, well might have been the product of coercive police action in the carrying out of the detention or initial illegality. Here, in contrast, the stop was routine and would not have overborne petitioner's ability to consent to any police contact. And the separate intervening act of an arrest pursuant to a warrant for conduct by petitioner that antedated the claimed illegal stop had nothing to do with any coercive affect on the Petitioner's state of mind.

Petitioner does not address the issue of causation in any detail in the petition. The only reference is a conclusory one stating petitioner's view that the evidence obtained against him was incident to his arrest and that his arrest was "a direct result of the unreasonable traffic stop and the resulting detention...." (Petn. at 22-23.) From there petitioner, briefly and without analysis, asserts that "the seized items are causally related to the illegal traffic stop." (Petn. at 23.) Finally, petitioner incorrectly argues that "the prosecution produced no evidence sufficient to purge the taint of the traffic stop." (Petn. at 23.) As the State has explained above the evidence showed that any taint had

been purged. Even the main case cited by petitioner in support of his petition, *United States v. Mosley*, 454 F.3d 249 (3rd Cir. 2006) does not support his argument concerning the required causation. The *Mosley* Court specifically noted that if the government was able to establish the existence of an intervening act or event that fact could purge the taint of the illegal stop. *Mosley*, 454 F.3d at 269. Here, respondent has pointed to two such factors, discussed above, the fact that a warrant for petitioner's arrest existed and was discovered, and the existence of a consensual contact between the officer and petitioner after the stop and at the time the warrant was discovered.

Thus, even if Petitioner had been unlawfully detained due to the stop of the vehicle, the evidence obtained against him was not subject to suppression because it was not the "fruit" of any "poisonous tree." Resolution of the question presented in petitioner's favor would not change the result in his case.

CONCLUSION

Accordingly, respondent respectfully requests this Court deny the petition for writ of certiorari.

Dated: January 12, 2007

Respectfully submitted,

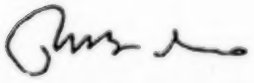
EDMUND G. BROWN JR.
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

DONALD E. DENICOLA
Deputy State Solicitor

MICHAEL A. CANZONERI
Supervising Deputy Attorney General



PAUL A. BERNARDINO
Deputy Attorney General
Counsel of Record

Counsel for Respondent

DISTRIBUTED
JAN 19 2007

ORIGINAL

Supreme Court, U.S.
FILED
JAN 16 2007
OFFICE OF THE CLERK

No. 06-8120

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari

To the California Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND
Executive Director
ELIZABETH CAMPBELL
Staff Attorney
2407 J Street, Suite 301
Sacramento, CA 95816
(916)441-3792

Attorneys for Petitioner

RECEIVED
JAN 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI	1
ARGUMENT	2
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Constitutional Provisions

Cases

Florida v. Bostick, 501 U.S. 429, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991) 6

People v. Brendlin, 38 Cal.4th 1107, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006) 2, 3

United States v. Ameling, 328 F.3d 443 (8th Cir. 2003) 3

United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) 7

United States v. DeLuca, 269 F.3d 1128 (10th Cir. 2001) 5

United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) 6

United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) 3

United States v. Grant, 349 F.3d 192 (5th Cir. 2003) 3

United States v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001) 7, 8

United States v. Mosley, 454 F.3d 249 (3rd Cir. 2006 3-5, 7, 8

United States v. Sowers, 136 F.3d 24 (1st Cir. 1998) 3

United States v. Twilley, 222 F.3d 1092 (9th Cir. 2000) 3

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 7

Other Authorities

6 Wayne R. LaFave, Search and Seizure § 11.3 (4th ed. 2004) 3

No. 06-8120

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari

To the California Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

In this reply, Petitioner will limit discussion to the argument raised by respondent in the opposition to the petition for writ of certiorari. Petitioner does not intend to belabor points already addressed in the petition itself.

ARGUMENT

Respondent urges this court to deny the petition for writ of certiorari because the evidence seized during the traffic stop was "not sufficiently connected to the allegedly illegal traffic stop." Resp. to Petn. at 7.[1] Respondent argues that Petitioner was "free to go once the stop had been effectuated," and that Petitioner's subsequent arrest and the ensuing search of the vehicle were the result of a continuing consensual encounter. Resp. to Petn. at 7.

Respondent presents the assertion that Mr. Brendlin was free to go once the car had come to a stop as if it were an unassailable conclusion, but in fact three members of the California Supreme Court expressly disagreed with that premise. As Justice Corrigan stated in her dissenting opinion, in which she was joined by two other justices,

> Passengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense. Certainly no one can safely leave the vehicle before it stops. Once it has pulled over, the officer has the authority, as a matter of law, to order that the passengers remain inside (*People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374-1375 [91 Cal. Rptr. 2d 204]), or get out of the vehicle (*Maryland v. Wilson* (1997) 519 U.S. 408, 410 [137 L. Ed. 2d 41, 117 S. Ct. 882]). This authority is soundly based on the need to protect the officer's safety. One of its necessary consequences, however, is that the passengers, having been forced to interrupt their journey, are deprived of further freedom of movement.

People v. Brendlin, 38 Cal.4th 1107, 1123-1124, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006) (Corrigan, J., dissenting). Justice Corrigan went on to state that she "would hold that passengers are 'seized' from the time a car is pulled over until the officer ends the restraint on their liberty, either by telling them they are free to leave or by releasing the occupants of the vehicle after completing the traffic stop." *Id.,* 38 Cal.4th at 1126.

---

[1]Respondent refers to the traffic stop as "allegedly illegal," but Respondent did not dispute in the California Supreme Court that the officer lacked reasonable suspicion to justify the traffic stop. *People v. Brendlin*, 38 Cal.4th 1107, 1114, 136 P.3d 845, 45 Cal.Rptr. 3d 50 (2006).

Nor are the federal circuits in agreement with Respondent's position. As already discussed in the original petition, the federal circuit courts to have considered the issue have unanimously held that a passenger is detained by virtue of a traffic stop and may challenge the fruits of that search. *See, e.g., United States v. Grant*, 349 F.3d 192 (5th Cir. 2003); *United States v. Ameling*, 328 F.3d 443 (8th Cir. 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States v. Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998); *United States v. Sowers*, 136 F.3d 24 (1st Cir. 1998); *see also* 6 Wayne R. LaFave, Search and Seizure § 11.3 (4th ed. 2004). More importantly, no circuit has adopt Respondent's simplified approach to the attenuation issue, i.e., that a passenger's detention ceases as soon as the vehicle comes to a stop, rendering all subsequent contact between the passenger and law enforcement "consensual," and thus attenuating the taint of the initial stop.

A Third Circuit panel applied a simple "but-for" test to determine whether evidence seized after an illegal traffic stop was admissible against a passenger. *United States v. Mosley*, 454 F.3d 249, 268 (3rd Cir. 2006). Under that test, if the evidence would not have been discovered absent the illegal traffic stop, it cannot be used against either the driver or any passengers unless the government establishes "one of the traditional exceptions" to the fruit of the poisonous tree rule: attenuation, inevitable discovery, independent source, or some intervening act or event sufficient to purge the taint of the illegal stop. *Id.* at 269.

Applying the *Mosley* test to the facts of this case, had the officer not made the illegal traffic stop, he would have had no occasion to look into Mr. Brendlin's parole status, would not have arrested Mr. Brendlin, and would not had reason to search the car incident to Mr. Brendlin's arrest. Thus, the discovery of the seized evidence had a clear

"but-for" connection to the illegal traffic stop. Respondent asserts that this case falls under an exception to the *Mosley* "but-for" test because of the existence of the outstanding warrant and the existence of "consensual" contact between the officer and Mr. Brendlin after the traffic stop. Resp. to Petn. at 14. The existence of the warrant, however, does not change the direct causal connection between the illegal traffic stop and the discovery of contraband in the car as a result of that stop; moreover, as already noted, the officer would not have discovered the existence of the outstanding warrant if not for the illegal traffic stop. Furthermore, as discussed above, the allegedly "consensual" nature of the contact between Mr. Brendlin and the officer is an issue open to some dispute, an issue that is entirely dependent upon whether the traffic stop constituted a *continuing* illegal seizure of both the driver and Mr. Brendlin.

Moreover, the question of what factual or causal relation test should apply to determine when to suppress evidence seized as the result of an illegal stop is something of a disputed question among the federal circuits. In adopting the "but-for" test, the *Mosley* court rejected the more stringent test applied by the District Court in that case, a test derived from the Tenth Circuit decision in *United States v. DeLuca*, 269 F.3d 1128 (10th Cir. 2001). Applying that test, the District Court looked for a "factual nexus" between the violation of the passenger's rights and the discovery of the evidence. Specifically, the court posed the question of whether, had the passenger "asked for and received permission to leave the scene immediately after the car was stopped, the evidence in the car would still have been discovered." *United States v. Mosley, supra,* 454 F.3d at 254. Under the *DeLuca* test, if the answer to the question is that the evidence still would have been discovered even had the passenger been allowed to leave, then the causal connection between the passenger's detention and the discovery of the evidence is too attenuated to

permit the passenger to move to suppress that evidence. *Id.*; *see also United States v. DeLuca, supra,* 269 F.3d at 1134.

Although the Third Circuit rejected the factual nexus test as too stringent and inappropriately applied in a case in which the passenger challenged the initial traffic stop, it is worth noting that even under the factual nexus test, Mr. Brendlin would be entitled to suppression of the seized evidence. Had Mr. Brendlin requested and been granted permission to leave the premises, then he would not have been arrested, and the search of the car incident to his arrest would not have occurred. Thus, even under the strict factual nexus test, Mr. Brendlin would be entitled to suppress the fruits of the traffic stop.

Respondent's reliance on this Court's holding in *United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) is misplaced. In that case, this Court merely applied the holding in *Florida v. Bostick*, 501 U.S. 429, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991) to a similar case involving officers boarding a bus, holding that officers need not expressly advise passengers of their right to refuse to cooperate. Respondent appears to rely on the facts of that case to support his argument that because the officer in this case did not make any order to the contrary, Mr. Brendlin was free to leave once the car came to a stop:

> The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

United States v. Drayton, supra, 536 U.S. at 203-204. The facts of *Drayton* are entirely distinguishable from the instant case, however, because as in *Florida v. Bostick*, no argument was made that the bus was illegally detained. Rather, the bus was halted at a

regular stopover, and police took the opportunity to board the bus and question passengers. *Id.* at 197-198. The rationale of that case is not applicable to a situation in which a traffic stop is illegal from its inception. *Cf. United States v. Mosley, supra,* 454 F.3d at 255.

Respondent further relies on this Court's holding in *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) as authority for the argument that the discovery of Mr. Brendlin's parole status was sufficiently attenuated from the traffic stop to eliminate the factual nexus. The factual scenario in *Crews* is entirely distinguishable from the case at bar, however. There, this Court held that a crime victim's in-court identification of a defendant was not the result of illegal police conduct. In so holding, the Court reviewed the in-court identification under the test articulated in *Wong Sun v. United States*, 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963): "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" After looking at the unique circumstances of an in-court identification, the Court held that the identification was not the result of exploitation of the illegal arrest. *United States v. Crews, supra,* 445 U.S. at 472-473.

A more apposite case is *United States v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001), in which an Eighth Circuit panel held that where an illegal traffic stop led to a passenger's arrest and ultimately to a confession of immigration violations, the Fourth Amendment required suppression of the confession as well as the passenger's fingerprints, because officers had obtained the statements and fingerprints "by exploiting his unlawful detention, instead of by means sufficient to have purged the taint of the

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 12, 2007

Respectfully submitted,

CENTRAL CALIFORNIA
APPELLATE PROGRAM

GEORGE BOND
Executive Director

ELIZABETH CAMPBELL
Staff Attorney

2407 J Street, Suite 301
Sacramento, CA 95816
(916)441-3792

Attorneys for Petitioner

Supreme Court, U.S.
FILED
MAR 5 - 2007
OFFICE OF THE CLERK

No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

JOINT APPENDIX

EDMUND G. BROWN, JR.
MARY JO GRAVES
MICHAEL P. FARRELL
DONALD E. DENICOLA
MICHAEL A. CANZONERI
PAUL A. BERNADINO
OFFICE OF THE ATTORNEY GENERAL OF CALIFORNIA
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324.5821

CLIFFORD E. ZALL *
1300 I Street
Sacramento, CA 95814
(916) 324.5281

Counsel of Respondent

ELIZABETH CAMPBELL *
2407 J Street
Suite 301
Sacramento, CA 95816
(916) 441.3792

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel of Petitioner

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PETITION FOR CERTIORARI FILED NOVEMBER 28, 2006
CERTIORARI GRANTED JANUARY 19, 2007

TABLE OF CONTENTS

	Page
Superior Court of California, Docket Entries	1
California Court of Appeals, Docket Entries	8
California Supreme Court, Docket Entries	13
Reporter's Transcript of Proceedings, *People* v. *Brendlin*, No. CRF012703 (Cal. Super. Ct. Dec. 31, 2001-Feb. 11, 2002)	20
People v. *Brendlin*, 8 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004)	102
People v. *Brendlin*, No. S123133 (Cal. Apr. 14, 2004) (order granting review)	112
People v. *Brendlin*, No. S123133 (Cal. May 12, 2004) (order limiting issues to be briefed)	113
People v. *Brendlin*, 136 P.3d 845 (Cal. 2006)	114
People v. *Brendlin*, No. S123133 (Cal. Aug. 30, 2004) (order denying rehearing)	141

CLERK'S DOCKET AND MINUTES

SUPEI & COURT OF CALIFORNIA, COUNTY OF TTER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD
ARRAIGNMENT

CASE NO: CR-F -01-0002703
DATE: November 29, 2001

JUDGE: CHANDLER DEPUTY CLERK: GRANT COURT REPORTER: _____

PEOPLE REPRESENTED BY: _____ DEFENDANT REPRESENTED BY: _____

☑ DEFENDANT PRESENT ☑ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN _____

☐ PROBATION OFFICER _____

FAILURE TO APPEAR:

☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation

☐ Execution stayed to _____ ☐ Trial date of _____ vacated

☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded

☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT:

☐ Failure to appear ☐ Violation of ☐ Probation ☐ Court Order ☐ Information ☑ Complaint ☐ Clerk's arraignment ☐ Citation

☑ In custody ☑ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea

☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____

☐ Formal arraignment waived ☑ Charges read ☐ Defendant orally advised of rights ☑ Statement of rights incorporated herein

☐ Time waived O/R release ☐ granted ☑ denied, bail set at $ 200,000 ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY:

☑ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☑ Public Defender appointed ☐ Conflict counsel appointed _____

☐ Denial entered ☑ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING:

☐ Preliminary Hearing Held/Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____

☐ Witness(es) testified: _____ ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTIONS/VIOLATION OF PROBATION HEARING:

☐ Witness(es) testified: _____

☐ Exhibit(s) marked: _____ ☐ Admitted: _____

☐ Motion(s): _____ ☐ Granted ☐ Denied

☐ Defendant found not guilty/ guilty of _____

☐ Defendant found in violation of probation by _____

☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES:

☐ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☐ Jury trial waived/ counsel joins ☐ Hearing continued ☐ Referred for diversion eligibility

☐ Preliminary hearing confirmed _____ ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived

☐ Jury Trial/Trial readiness set/reset/confirmed

PLEA OF GUILTY:

☐ Complaint amended to make count _____ a misdemeanor violation of _____

☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived

☐ Information amended to add/make count _____ a violation of _____ ☐ Arraignment waived

☐ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein

☐ Defendant ☐ Counsel for defendant pleads ☐ Guilty _____ ☐ No Contest _____

☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison

☐ Admits violation of ☐ probation ☐ court order by _____

☐ Count(s) _____ dismissed in interest of justice ☐ Violation of probation dismissed

☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report

☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated

☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE:

☐ No legal cause why judgment should not be pronounced ☐ Time waived

☐ Formal arraignment waived ☐ Probation report waived ☐ Probation denied

☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (_____ + _____)

☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (_____ + _____)

☐ Defendant sentenced to _____ days jail _____ ☐ Concurrent/Consecutive to _____

☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal

☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted

☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered

☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____

☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital

☐ Notice, Sentence, Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein

☐ $ _____ Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.

☐ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS:

☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice

☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved

☐ Request for dismissal & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____

☐ Motions(s): _____ ☐ Granted ☐ Denied ☐ Continued

☐ _____

☐ _____

☐ _____

☐ _____

BEST AVAILABLE COPY

CLERK'S DOCKET AND MINUTES

SUPERI. . COURT OF CALIFORNIA, COUNTY OF S . ER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD — CASE NO: CR-F -01-0002703

PRELIM PRETRIAL CONF — DATE: December 5, 2001

JUDGE: Cameron — DEPUTY CLERK: L. Lawrence — COURT REPORTER: Mary Wyllie

PEOPLE REPRESENTED BY: Fred Schroeder — DEFENDANT REPRESENTED BY: Tim Warriner

☒ DEFENDANT PRESENT ☒ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN _____

☐ PROBATION OFFICER _____

FAILURE TO APPEAR

☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation

☐ Execution stayed to _____ ☐ Trial date of _____ vacated

☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded

☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT

☐ Failure to appear ☐ Violation of ☐ Probation ☐ Court Order ☐ Information ☐ Complaint ☐ Clerk's arraignment ☐ Citation

☐ In custody ☐ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea

☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____

☐ Formal arraignment waived ☐ Charges read ☐ Defendant orally advised of rights ☐ Statement of rights incorporated herein

☐ Time waived O/R release ☐ granted ☐ denied, bail set at $ _____ ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY:

☐ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☐ Public Defender appointed ☐ Conflict counsel appointed _____

☐ Denial entered ☐ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING

☐ Preliminary Hearing Held/Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____

☐ Witness(es) testified: _____ ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTION/VIOLATION OF PROBATION HEARING

☐ Witness(es) testified: _____

☐ Exhibit(s) marked: _____ ☐ Admitted: _____

☐ Motion(s): _____ ☐ Granted ☐ Denied

☐ Defendant found not guilty/ guilty of _____

☐ Defendant found in violation of probation by _____

☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES:

☐ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☐ Jury trial waived/ counsel joins ☐ Hearing continued ☐ Referred for diversion eligibility

☒ Preliminary hearing confirmed 12-20-01 at 9AM ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived

☐ Jury Trial/Trial readiness set/reset/confirmed

PLEA OF GUILTY:

☐ Complaint amended to make count _____ a misdemeanor violation of _____

☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived

☐ Information amended to add/make count _____ a violation of _____ ☐ Arraignment waived

☐ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein

☐ Defendant ☐ Counsel for defendant pleads ☐ Guilty _____ ☐ No Contest _____

☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison

☐ Admits violation of ☐ probation ☐ court order by _____

☐ Count(s) _____ dismissed in interest of justice ☐ Violation of probation dismissed

☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report

☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated

☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE:

☐ No legal cause why judgment should not be pronounced ☐ Time waived

☐ Formal arraignment waived ☐ Probation report waived ☐ Probation denied

☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ___ (_____ + _____)

☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ___ (_____ + _____)

☐ Defendant sentenced to _____ days jail _____ ☐ Concurrent/Consecutive to _____

☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal

☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted

☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered

☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____

☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital

☐ Notice, Sentence Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein

☐ $ _____ Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.

☐ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS:

☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice

☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved

☐ Request for disqualification & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____

☐ Motions(s): _____ ☐ Granted ☐ Denied ☐ Continued

☐ _____

☐ _____

☐ _____

☐ _____

00005

2

CLERK'S DOCKET AND MINUTES

SUPE.. JR COURT OF CALIFORNIA, COUNTY OI TTER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD
PRELIMINARY HEARING

CASE NO: CR-F -01-0002703
DATE: December 7, 2001

JUDGE: Damon DEPUTY CLERK: MLourenda COURT REPORTER: Julie Martinez

PEOPLE REPRESENTED BY: Susan Green DEFENDANT REPRESENTED BY: Tom Warriner

☑ DEFENDANT PRESENT ☐ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN _____
☐ PROBATION OFFICER _____

FAILURE TO APPEAR
☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation
☐ Execution stayed to _____ ☐ Trial date of _____ vacated
☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded
☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT
☐ Failure to appear ☐ Violation of ☐ Probation ☐ Court Order ☐ Information ☐ Complaint ☐ Clerk's arraignment ☐ Citation
☐ In custody ☐ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea
☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____
☐ Formal arraignment waived ☐ Charges read ☐ Defendant orally advised of rights ☐ Statement of rights incorporated herein
☐ Time waived O/R release ☐ granted ☐ denied, bail set at $_____ ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY
☐ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☐ Public Defender appointed ☐ Conflict counsel appointed _____
☐ Denial entered ☐ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING
☐ Preliminary Hearing ☐ Held ☐ Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Witness(es) testified: Robert Brokenbrough, Deputy Garbutt ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTION/VIOLATION OF PROBATION HEARING
☐ Witness(es) testified: _____
☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Motion(s): _____ ☐ Granted ☐ Denied
☐ Defendant found not guilty/ guilty of _____
☐ Defendant found in violation of probation by _____
☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES
☑ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☐ Jury trial waived/ counsel joins ☑ Hearing continued ☐ Referred for diversion eligibility
☐ Preliminary hearing confirmed _____ ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived
☐ Jury Trial/Trial readiness set/reset/confirmed

PLEA OF GUILTY
☐ Complaint amended to make count _____ a misdemeanor violation of _____
☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Information amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein
☐ Defendant ☐ Counsel for defendant pleads ☐ Guilty _____ ☐ No Contest _____
☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison
☐ Admits violation of ☐ probation ☐ court order by _____
☐ Count(s) _____ dismissed in interest of justice ☐ Violation of probation dismissed
☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report
☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated
☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE
☐ No legal cause why judgment should not be pronounced ☐ Time waived
☐ Formal arraignment waived ☐ Probation report waived ☐ Probation denied
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (_____+_____)
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (_____+_____)
☐ Defendant sentenced to _____ days jail _____ ☐ Concurrent/Consecutive to _____
☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal
☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted
☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered
☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____
☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital
☐ Notice, Sentence, Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein
☐ $ _____ Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.
☐ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS
☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice
☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved
☐ Request for dismissal & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____
☐ Motions(s): _____ ☐ Granted ☐ Denied ☐ Continued
☐ _____
☐ _____
☐ _____
☐ _____

00606

CLERK'S DOCKET AND MINUTES

SUPERIOR COURT OF CALIFORNIA, COUNTY OF . ,TER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD — CASE NO: CR-F -01-0002703

ARRAIGNMENT — DATE: December 31, 2001

JUDGE: H. TED HANSEN — DEPUTY CLERK: DIANA F. TORRES — COURT REPORTER: Lori Beck

PEOPLE REPRESENTED BY: D. Arnson — DEFENDANT REPRESENTED BY: T. Warriner

☑ DEFENDANT PRESENT ☑ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN _____ ☐ PROBATION OFFICER _____

FAILURE TO APPEAR:

☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation
☐ Execution stayed to _____ ☐ Trial date of _____ vacated
☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded
☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT:

☐ Failure to appear ☐ Vjolation of ☐ Probation ☐ Court Order ☑ Information ☐ Complaint ☐ Clerk's arraignment ☐ Citation
☑ In custody ☑ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea
☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____
☑ Formal arraignment waived ☐ Charges read ☐ Defendant orally advised of rights ☐ Statement of rights incorporated herein
☐ Time waived C/R release ☐ granted ☐ denied, bail set at $_____ ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY: Warriner

☑ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☑ Public Defender appointed ☐ Conflict counsel appointed _____
☐ Denial entered ☑ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING:

☐ Preliminary Hearing Held/Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Witness(es) testified: _____ ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTIONS/VIOLATION OF PROBATION HEARING:

☐ Witness(es) testified: _____
☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Motion(s): _____ ☐ Granted ☐ Denied
☐ Defendant found not guilty/ guilty of _____
☐ Defendant found in violation of probation by _____
☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES: 1) Felony PT Set

☐ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☐ Jury trial waived/ counsel joins ☐ Hearing continued ☐ Referred for diversion eligibility
☐ Preliminary hearing confirmed _____ ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived

PLEA OF GUILTY: ☑ Jury Trial/Trial readiness ~~set/reset/confirmed~~

☐ Complaint amended to make count _____ a misdemeanor violation of _____
☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Information amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein
☐ Defendant ☐ Counsel for defendant pleads ☐ Guilty _____ ☐ No Contest _____
☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison
☐ Admits violation of ☐ probation ☐ court order by _____
☐ Count(s) _____ dismissed in interest of justice ☐ Violation of probation dismissed
☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report
☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated
☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE:

☐ No legal cause why judgment should not be pronounced ☐ Time waived
☐ Formal arraignment waived ☐ Probation report waived ☐ Probation denied
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ___ (_____ + _____)
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ___ (_____ + _____)
☐ Defendant sentenced to _____ days jail _____ ☐ Concurrent/Consecutive to _____
☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal
☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted
☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered
☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____
☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital
☐ Notice, Sentence, Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein
☐ $ _____ Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.
☐ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS:

☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice
☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved
☐ Request for dismissal & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____
☐ Motions(s): _____ ☐ Granted ☐ Denied ☐ Continued
☐ _____
☐ _____
☐ _____
☐ _____

00039

CLERK'S DOCKET AND MINUTES

SUPER COURT OF CALIFORNIA, COUNTY OF S TER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD
FELONY PRETRIAL CONF

CASE NO: CR-F -01-0002703
DATE: January 14, 2002

JUDGE: CHRIS CHANDLER DEPUTY CLERK: MARIA CARMONA COURT REPORTER: Laura Blum

PEOPLE REPRESENTED BY: Brian Aronson DEFENDANT REPRESENTED BY: R. Thomas

☐ DEFENDANT PRESENT ☐ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN _____
☐ PROBATION OFFICER _____

FAILURE TO APPEAR
☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation
☐ Execution stayed to _____ ☐ Trial date of _____ vacated
☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded
☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT
☐ Failure to appear ☐ Violation of ☐ Probation ☐ Court Order ☐ Information ☐ Complaint ☐ Clerk's arraignment ☐ Citation
☐ In custody ☐ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea
☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____
☐ Formal arraignment waived ☐ Charges read ☐ Defendant orally advised of rights ☐ Statement of rights incorporated herein
☐ Time waived O/R release ☐ granted ☐ denied, bail set at $_____ ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY
☐ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☐ Public Defender appointed ☐ Conflict counsel appointed _____
☐ Denial entered ☐ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING
☐ Preliminary Hearing Held/Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Witness(es) testified: _____ ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTIONS/VIOLATION OF PROBATION HEARING
☐ Witness(es) testified: _____
☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Motion(s): _____ ☐ Granted ☐ Denied
☐ Defendant found not guilty/ guilty of _____
☐ Defendant found in violation of probation by _____
☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES
☐ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☐ Jury trial waived/ counsel joins ☐ Hearing continued ☐ Referred for diversion eligibility
☐ Preliminary hearing confirmed _____ ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived
☐ Jury Trial/Trial readiness set/reset/confirmed

PLEA OF GUILTY
☐ Complaint amended to make count _____ a misdemeanor violation of _____
☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Information amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein
☐ Defendant ☐ Counsel for defendant pleads ☐ Guilty _____ ☐ No Contest _____
☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison
☐ Admits violation of ☐ probation ☐ court order by _____
☐ Count(s) _____ dismissed in interest of justice ☐ Violation of probation dismissed
☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report
☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated
☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE
☐ No legal cause why judgment should not be pronounced ☐ Time waived
☐ Formal arraignment waived ☐ Probation report waived ☐ Probation denied
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (____+____)
☐ Defendant sentenced to the _____ term of _____ years _____ months in prison on count: _____ CTS ____ (____+____)
☐ Defendant sentenced to _____ days jail _____ ☐ Concurrent/Consecutive to _____
☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal
☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted
☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered
☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____
☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital
☐ Notice, Sentence, Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein
☐ $ _____ Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.
☐ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS
☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice
☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved
☐ Request for dismissal & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____
☐ Motions(s): _____ ☐ Granted ☐ Denied ☐ Continued
☐ _____
☐ _____
☐ _____
☐ _____

00041

CLERK'S DOCKET AND MINUTES

SUPE. .R COURT OF CALIFORNIA, COUNTY OF ..JTTER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD
1538.5 MOTION

CASE NO: CR-F -01-0002703
DATE: February 8, 2002

JUDGE: Ann Rutherford DEPUTY CLERK: DIANA F. TORRES COURT REPORTER: Kim Durso

PEOPLE REPRESENTED BY: S. Green DEFENDANT REPRESENTED BY: T. Warriner

☑ DEFENDANT PRESENT ☑ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN _____
☐ PROBATION OFFICER _____

FAILURE TO APPEAR
☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation
☐ Execution stayed to _____ ☐ Trial date of _____ vacated
☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded
☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT
☐ Failure to appear ☐ Violation of ☐ Probation ☐ Court Order ☐ Information ☐ Complaint ☐ Clerk's arraignment ☐ Citation
☐ In custody ☐ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea
☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____
☐ Formal arraignment waived ☐ Charges read ☐ Defendant orally advised of rights ☐ Statement of rights incorporated herein
☐ Time waived O/R release ☐ granted ☐ denied, bail set at $ _____ ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY
☐ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☐ Public Defender appointed ☐ Conflict counsel appointed _____
☐ Denial entered ☐ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING
☐ Preliminary Hearing Held/Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Witness(es) testified: _____ ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTION/VIOLATION OF PROBATION HEARING
☑ Witness(es) testified: Robert Charles Bakenhaugh, Clifton Bowman, Sarah Allen Dunn, M. Regan
☑ Exhibit(s) marked: Defendant's A-D, Peoples 1-3 ☑ Admitted: Defendants A-D, Peoples 1-3
☐ Motion(s): _____ ☐ Granted ☐ Denied
☐ Defendant found not guilty/ guilty of _____
☐ Defendant found in violation of probation by _____
☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES
☐ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☐ Jury trial waived/ counsel joins ☐ Hearing continued ☐ Referred for diversion eligibility
☐ Preliminary hearing confirmed _____ ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived
☐ Jury Trial/Trial readiness set/reset/confirmed

PLEA OF GUILTY:
☐ Complaint amended to make count _____ a misdemeanor violation of _____
☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Information amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☐ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein
☐ Defendant ☐ Counsel for defendant pleads ☐ Guilty _____ ☐ No Contest _____
☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison
☐ Admits violation of ☐ probation ☐ court order by _____
☐ Count(s) _____ dismissed in interest of justice ☐ Violation of probation dismissed
☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report
☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated
☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE
☐ No legal cause why judgment should not be pronounced ☐ Time waived
☐ Formal arraignment waived ☐ Probation report waived ☐ Probation denied
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (____ + ____)
☐ Defendant sentence to the _____ term of _____ years _____ months in prison on count _____ CTS ____ (____ + ____)
☐ Defendant sentenced to _____ days jail _____ ☐ Concurrent/Consecutive to _____
☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal
☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted
☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered
☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____
☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital
☐ Notice, Sentence, Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein
☐ $ _____ Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.
☐ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS:
☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice
☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved
☐ Request for dismissal & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____
☑ Motion(s): Motion to Suppress is argued ☐ Granted ☐ Denied ☐ Continued
☐ and submitted. Parties are Counsel. Motion to suppress is denied. Motion
☐ to Continue jury trial by DA is Heard. To Monday, 2-11-02, @ 1:30 pm.
☐ _____
☐ _____

00085

CLERK'S DOCKET AND MINUTES

SUPERI . COURT OF CALIFORNIA, COUNTY OF S ER

DEFENDANT (NAME): BRENDLIN, BRUCE EDWARD
TRIAL READINESS CONF

CASE NO: CR-F -01-0002703
DATE: February 11, 2002

JUDGE: Chris Chandler DEPUTY CLERK: Maria Lawrence COURT REPORTER: Laura Blum

PEOPLE REPRESENTED BY: Sara Green DEFENDANT REPRESENTED BY: Tim Warriner

☑ DEFENDANT PRESENT ☑ IN CUSTODY ☐ DEFENDANT NOT PRESENT ☐ INTERPRETER SWORN ☐ PROBATION OFFICER

FAILURE TO APPEAR:
☐ O/R revoked ☐ Bail forfeited ☐ Warrant ordered, bail $ _____ (Section _____) ☐ Counsel relieved of further representation
☐ Execution stayed to _____ ☐ Trial date of _____ vacated
☐ Stay on warrant dissolved ☐ Legal excuse for nonappearance, order for ☐ Forfeiture ☐ Revocation set aside ☐ Warrant recalled ☐ Order for warrant rescinded
☐ Court Costs imposed $ _____ due by _____ ☐ Bail/O.R. reinstated

ARRAIGNMENT
☐ Failure to appear ☐ Violation of ☐ Probation ☐ Court Order ☐ Information ☐ Complaint ☐ Clerk's arraignment ☐ Citation
☐ In custody ☐ Correct name determined ☐ Arraignment continued to obtain private counsel ☐ Arraignment continued for entry of plea
☐ Complaint amended to ☐ Show correct name _____ ☐ Add count _____
☐ Formal arraignment waived ☐ Charges read ☐ Defendant orally advised of rights ☐ Statement of rights incorporated herein
☐ Time waived O/R release ☐ granted ☐ denied, bail set at $_____ ☐ O/R Agreement incorporated herein ☐ Arraignment continued to obtain license

PLEA OF NOT GUILTY:
☐ Plea(s) of NOT GUILTY entered ☐ Prior(s) denied ☐ Time waived ☐ Public Defender appointed ☐ Conflict counsel appointed _____
☐ Denial entered ☐ Notice, Sentence, Calendar, Commitment incorporated herein

PRELIMINARY HEARING
☐ Preliminary Hearing Held/Waived ☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Witness(es) testified: _____ ☐ Certification incorporated herein ☐ Information Filed _____

COURT TRIAL/MOTIONS/VIOLATION OF PROBATION HEARING
☐ Witness(es) testified: _____
☐ Exhibit(s) marked: _____ ☐ Admitted: _____
☐ Motion(s): _____ ☐ Granted ☐ Denied
☐ Defendant found not guilty/ guilty of _____
☐ Defendant found in violation of probation by _____
☐ Count(s) dismissed _____ ☐ Court's motion ☐ District Attorney's motion ☐ Violation of probation dismissed

CONTINUANCES
☐ Notice, Sentence, Calendar, Commitment incorporated herein ☐ Time waived ☑ Jury trial waived/ counsel joins ☐ Hearing continued ☐ Referred for diversion eligibility
☐ Preliminary hearing confirmed _____ ☐ Violation of probation hearing confirmed _____ ☐ Arraignment waived
☐ Jury Trial/Trial readiness set/reset/confirmed

PLEA OF GUILTY
☐ Complaint amended to make count _____ a misdemeanor violation of _____
☐ Complaint amended to add/make count _____ a violation of _____ ☐ Arraignment waived
☑ Information amended to add/make count (one CT) a violation of 666/7.5(b)PC (Prison Prior) ☐ Arraignment waived
☑ Advised of maximum penalties and waived constitutional rights ☐ Entry of plea form incorporated herein
☑ Defendant ☐ Counsel for defendant pleads ☑ Guilty 11378.66)H&S 667.5(b)PC ☐ No Contest _____
☐ Admits prior(s) _____ ☐ Stipulated sentence _____ ☐ No immediate State Prison
☐ Admits violation of ☐ probation ☐ court order by _____
☑ Count(s) remaining as to this defendant only are ☐ dismissed in interest of justice ☐ Violation of probation dismissed
☐ Motion to dismiss remaining count(s) taken under submission ☐ Referred to Probation Department for sentencing report
☐ Time waived ☐ Arbuckle waiver ☐ Given ☐ Declined ☐ O/R Agreement incorporated herein ☐ Jury Trial vacated
☐ Harvey waiver as to Count(s) _____ ☐ Certification incorporated herein ☐ Notice, Sentence, Calendar, Commitment incorporated herein

JUDGMENT/SENTENCE
Total 4 years; term to run concurrent to any parole violation
☑ No legal cause why judgment should not be pronounced ☑ Time waived
☑ Formal arraignment waived ☑ Probation report waived ☐ Probation denied
☑ Defendant sentence to the Upper term of 3 years ____ months in prison on count 1 CTS 115 (77 + 88)
☑ Defendant sentence to the Upper term of 1 years ____ months in prison on count ____ CTS ____ (____ + ____)
☐ Defendant sentenced to _____ days jail _____ ☑ Concurrent ☐ Consecutive to CT 1
☐ Defendant to pay fine $ _____ ☐ forthwith ☐ Defendant admitted to probation _____ months ☐ Summary ☐ Formal
☐ Probation reinstated and modified ☐ Probation terminated ☐ Diversion granted 667.5(b)PC
☐ Violation of probation dismissed ☐ Public Defender fees of $ _____ ordered
☐ Remaining count(s) dismissed ☐ Count(s) dismissed _____
☐ Criminal proceedings suspended and defendant to be placed at: ☐ California Rehabilitation Center ☐ _____ State Hospital
☐ Notice, Sentence, Calendar, Commitment ☐ Promise to pay ☐ Order incorporated herein
☑ $ 200 Restitution fine pursuant to § 1202.4(b) P.C. ☐ To be collected by CDC pursuant to §2085.5 P.C.
☑ Restitution fine pursuant to §1202.45 P.C. stayed pending successful completion of parole.

MISCELLANEOUS:
☐ No complaint filed ☐ Matter held pending ☐ Notice, Sentence, Commitment incorporated herein ☐ Case dismissed in the interest of justice
☐ Dropped from calendar ☐ Refusal on file ☐ O/R Agreement incorporated herein ☐ Substitution of counsel, Public Defender relieved
☐ Request for dismissal & Order filed ☐ Warrant recalled ☐ Conflict declared, counsel relieved, conflict counsel appointed _____
☐ Motion(s): _____ ☐ Granted ☐ Denied ☐ Continued
☑ Advised of Appeal Rights
☐ _____
☐ _____
☐ _____

00088

CALIFORNIA APPELLATE COURTS
3rd Appellate District

Case Number C040754

THE PEOPLE,
Plaintiff and Respondent,
v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

DOCKET ENTRIES

Date	Description	Notes
03/28/2002	Notice of appeal lodged/received (criminal).	Filed in superior court on 03/15/02. Manufacture of methamphetamine.
04/05/2002	Record on appeal filed.	1 VOL. CT (91 pgs.); 1 VOL. RT (85 pgs.) Probation report waived. AOB DUE: 05/15/02.
04/24/2002	Appointment/recommendation req. for counsel filed.	
04/25/2002	Counsel appointment order filed.	Attorney James Johnson for appellant. AOB DUE: 05/28/02
05/23/2002	Filed application and order of:	appellant to 06/27/02.
07/01/2002	Appellant's opening brief.	Attorney: Johnson, James Party: Brendlin, Bruce

Date	Description	Notes
07/31/2002	Filed application and order of:	respondent to 08/30/02.
08/12/2002	Received copy of	amended abstract correcting sentencing credits.
08/29/2002	Filed application and order of:	respondent to 09/30/02.
09/27/2002	Granted-extension of time.	Respondent to 10/29/02. No further time.
11/01/2002	Respondent notified pursuant to rule 17(a)(2) or 37(b).	Attorney: Office of the State Attorney General Party: The People Brief due: 12/02/02.
11/27/2002	Respondent's brief.	Attorney: Office of the State Attorney General Party: The People
12/16/2002	Appellant's reply brief.	Attorney: Johnson, James Party: Brendlin, Bruce
12/16/2002	Case fully briefed.	
01/06/2004	Oral argument waiver notice sent.	Request due: 01/16/04
01/27/2004	Cause submitted after approval of argument waiver.	SCOTLAND, P.J.
01/27/2004	Opinion filed.	The judgment is reversed. Review granted in Supreme Court.

Date	Description	Notes
02/03/2004	Rehearing petition filed.	by respondent. DUE: 02/26/04
02/05/2004	Order denying rehearing petition filed	SCOTLAND, P.J. (BRo)
03/05/2004	Service copy of petition for review received.	Respondent People's.
03/08/2004	Service copy of petition for review received.	Respondent's.
03/05/2004	Petition for review filed in Supreme Court.	By Respondent in San Francisco.
03/22/2004	Record transmitted to Supreme Court.	1 Vol.
04/14/2004	Petition for review granted in Supreme Court.	GEORGE, J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., BROWN, J., MORENO, J.
09/08/2004	Answer to petition for review received	Appellant's
10/14/2004	Received copy of Supreme Court filing.	Respondent's reply brief.

Date	Description	Notes
07/10/2006	Received copy of	Appellant's petition for rehearing in the Supreme Court (S123133).
07/19/2006	Received copy of Supreme Court filing.	Application of Matthew Gordon Lamont for leave to file an amicus curiae brief in support of appellant Brendlin's petition for rehearing.
07/19/2006	Received copy of Supreme Court filing.	Corrected application of Matthew Gordon Lamont for leave to file amicus curiae brief in support of appellant Brendlin's petition for rehearing.
07/19/2006	Received copy of Supreme Court filing.	Amicus curiae brief of Matthew Gordon Lamont in support of appellant Brendlin's petition for rehearing.
08/30/2006	Received:	copy of petition for rehearing denied in Supreme Court. Werdegar, Moreno, and Corrigan, JJ., are of the opinion the petition should be granted. GEORGE, C.J.
09/01/2006	Remittitur received from Supreme Court.	2 certified copies of the opinion filed 06/29/06, and 2 copies of the remittitur issued 08/30/06, reversing this court's decision.

Date	Description	Notes
09/07/2006	Filed:	original remittitur with opinion of the Supreme Court.
09/11/2006	Remittitur issued.	With certified copy of the Supreme Court opinion and Supreme Court remittitur.
09/11/2006	Case complete.	
09/18/2006	Court's correspondence returned.	Appellant's copy of Supreme Court remittitur, marked "Return to sender, discharged". Placed in file.
11/29/2006	Received copy of	Petition for writ of certiorari for filing in U.S. Supreme Court.

CALIFORNIA APPELLATE COURTS
Supreme Court

Case Number S123133

THE PEOPLE,
Pkaintiff and Respondent,
v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

DOCKET ENTRIES

Date	Description	Notes
03/05/2004	Petition for review filed	In Sacramento by counsel for Respondent (The People).
03/08/2004	Record requested	
03/23/2004	Received Court of Appeal record	one doghouse
04/14/2004	Petition for review granted (criminal case)	Votes: George, Kennard, Baxter, Werdegar, Chin, Brown and Moreno, JJ.
04/20/2004	Request for extension of time filed	(in Sacramento) by respondent (People) for a 28-day extension to and including June 11, 2004 to file the opening brief on the merits.

Date	Description	Notes
04/26/2004	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file Respondent's Opening Brief on the Merits is extended to and including June 11, 2004.
05/12/2004	Issues ordered limited	The issues to be briefed and argued in this case are the following: (1) Was defendant, as a passenger in a vehicle subjected to a traffic stop, thereby "detained" for purposes of the Fourth Amendment, thus allowing him to contest the legality of the stop? (2) Could the vehicle be stopped on reasonable suspicion that it was being operated while unregistered, in violation of the Vehicle Code, when it exhibited an expired license plate registration tag, but also displayed what appeared from a distance to be a current temporary registration permit?
05/17/2004	Received:	
05/19/2004	Request for extension of time filed	to July 9, 2004, to file respondent's opening brief on the merits. (Second request filed in Sacramento)

Date	Description	Notes
05/25/2004	Extension of time granted	On application of respondent and good cause appearing, it is ordered that the time to serve and file Respondent's Opening Brief on the Merits is extended to and including July 9, 2004. No further extensions of time are contemplated.
05/27/2004	Counsel appointment order filed	Upon request of appellant for appointment of counsel, the Central California Appellate Program is hereby appointed to represent appellant on his appeal now pending in this court. Appellant's brief on the merits shall be served and filed on or before thirty (30) days from the date respondent's opening brief on the merits is filed.
07/09/2004	Opening brief on the merits filed	(in Sacramento) by respondent
08/09/2004	Request for extension of time filed	(in Sacramento) for an e.o.t. to 9-8-2004, to file appellant's answer brief/ merits. 30-day extension granted as requested. No further extensions of time are contemplated.

Date	Description	Notes
08/13/2004	Extension of time granted	On application of appellant and good cause appearing, it is ordered that the time to serve and file the answer brief on the merits is extended to and including September 8, 2004. No further extensions of time are contemplated.
09/08/2004	Answer brief on the merits filed	(in Sacramento) by appellant (Brendlin)
09/21/2004	Request for extension of time filed	by respondent (the People) to file the reply brief on the merits asking to Oct. 18, 2004
09/28/2004	Extension of time granted	to 10-18-04 for resp to file the reply brief on the merits. No further extensions of time are contemplated.
10/13/2004	Reply brief filed (case fully briefed)	by resp
01/12/2005	Compensation awarded counsel	Atty Campbell
03/08/2006	Case ordered on calendar	Wednesday, April 5, 2006, at 9:00 a.m., in Los Angeles
04/05/2006	Cause argued and submitted	

Date	Description	Notes
06/29/2006	Opinion filed: Judgment reversed	Judgment of the Court of Appeal. Opinion by Baxter, J.—joined by George, C.J., Kennard, Chin, JJ.
		Dissenting Opinion by Corrigan, J.—joined by Werdegar and Moreno, JJ.
07/11/2006	Rehearing petition filed	Bruce Brendlin, appellant, by Elizabeth Campbell, Staff Attorney, Central California Appellant Program.
07/12/2006	Time extended to consider modification or rehearing	to and including September 27, 2006, or the date upon which rehearing is either granted or denied, whichever occurs first.
07/17/2006	Received:	Application to file amicus curiae brief of Matthew Gordon Lamont [appellant in pending case No. S131308, People v Lamont] in support of petition for rehearing (Brendlin's) [brief separate]

Date	Description	Notes
07/24/2006	Application denied	The application of Matthew Gordon Lamont for leave to file amicus curiae brief in support of appellant's petition for rehearing is hereby denied. [Original returned to Attorney Edward A. Hoffman with a copy of the order.]
07/24/2006	Received:	
08/30/2006	Rehearing denied	Werdegar, Moreno, and Corrigan, JJ., are of the opinion the petition should be granted.
08/30/2006	Remittitur issued (criminal case)	
09/07/2006	Received:	Receipt for remittitur from Third Appellate District, signed for by Theresa Devine, Deputy Clerk.
11/30/2006	Received:	Copy of Petition for Writ of Certiorari filed in the Supreme Court of the United States
12/08/2006	Received:	U.S.S.C. letter dated 12-4-2006, writ of certiorari filed 11-28-2006, placed on the docket 12-4-2006 as No. 06-8120.

Date	Description	Notes
01/29/2007	Received:	Supreme Court of the United States letter dated January 19, 2007, motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted.
01/31/2007	Received:	From Central C.A.P. a copy of request for appointment of counsel in the Supreme Court of the United States case No. 06-8120.
02/14/2007	Received:	letter from the Clerk of the United States Supreme dated February 9, 2007, requesting that the entire record be transmitted to their court.
02/15/2007	Note:	Record sent to United States Supreme Court pursuant to letter from the Clerk dated February 9, 2007. 1 doghouse sent via UPS overnight.

IN THE APPELLATE COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

- 3 Crim
Sutter County
No. CRF-01-2703

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent,

- VS -

BRUCE EDWARD BRENDLIN,
Appellant.

REPORTERS' TRANSCRIPT ON APPEAL
Appeal in the above-entitled matter
Superior Court of the State of California,
in and for the County of Sutter,
Honorable H. TED HANSEN, Judge
Honorable ANN RUTHERFORD, Judge
Honorable CHRIS CHANDLER, Judge

VOLUME ONE OF ONE

COUNSEL

For the Respondent: HONORABLE BILL LOCKYER
Attorney General of the
State of California
1300 I Street
Sacramento, California 95814

For the Appellant: IN PROPRIA PERSONA

COURT REPORTERS
Lori Beck, CSR No. 6565
Kimberly E. Durso, CSR No. 11372
Laura Blum, CSR No. 6093

IN THE APPELLATE COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

COURT REPORTERS TRANSCRIPT ON APPEAL

VOLUME ONE

Monday, December 31, 2001
Monday, January 14, 2002
Friday, February 8, 2002
Monday, February 11, 2002

VOLUME ONE
(Pages 1 through 85)

Monday, December 31, 2001
Monday, January 14, 2002
Friday, February 8, 2002
Monday, February 11, 2002

CHRONOLOGICAL INDEX

DATE	HEARING	PAGES
MONDAY, DECEMBER 31, 2001		
	Arraignment (Hon. Hansen)	1-3
MONDAY, JANUARY 14, 2002		
	Felony Pretrial Conference (Hon Chandler)	4
FRIDAY, FEBRUARY 8, 2002		
	1538.5 Motion (Hon. Rutherford)	5-72
	OFFICER ROBERT BROKENBROUGH	
	Direct Examination by Ms. Green	11
	Cross-Examination by Mr. Warriner	25
	Cross-Examination by Mr. Hansen	40
	Redirect Examination by Ms. Green	44
	Recross-Examination by Mr. Warriner	49
	Recross-Examination by Mr. Hansen	50
	CLIFTON BOWMAN	
	Direct Examination by Ms. Green	51
	LARRY DUNN	
	Direct Examination by Ms. Green	55
	Cross-Examination by Mr. Warriner	57
	Redirect Examination by Ms. Green	58
	MARK REGAN	
	Direct Examination by Mr. Warriner	60
	Cross-Examination by Ms. Green	64
	Redirect Examination by Mr. Warriner	66
MONDAY, FEBRUARY 11, 2002		
	Trial Readiness Conference (Hon. Chandler)	73-85
	Reporters' Certificates	86

INDEX OF EXHIBITS

Friday, February 8, 2002

PARTY'S		DESCRIPTION	ID/EVD
Def. Exh.	A	Photo, temporary sticker	27, 64
	B	Photo, vehicle	49, 64
	C	Photo, receipt.....	61, 64
	D	Report of deposit fees	61, 64

[1] MONDAY, DECEMBER 31, 2001

The matter of the People of the State of California, Plaintiff, versus BRUCE EDWARD BRENDLIN, Defendant, No. CRF-01-2703, came on regularly this day before the Honorable H. TED HANSEN, judge of the Superior Court of California, county of Sutter, Courtroom 2.

The People were present represented by BRIAN ARONSON, Deputy District Attorney of Sutter County.

The Defendant, BRUCE EDWARD BRENDLIN, was present and represented by TIMOTHY WARRINER, Deputy Public Defender.

The following proceedings were then had:

THE COURT: The court will call the case of the People of the state of California versus Karen Simeroth and Bruce Brendlin. This is case CRF-01-2703. Both defendants are present in court. With them are their attorneys. With Mr. Brendlin, the public defender, Mr. Warriner, and with Miss Simeroth Norman Hansen, and the people are represented by Brian Aronson of the district attorney's office. This is the time and place set for arraignment on an Information which has been filed by the people.

Mr. Brendlin and Miss Simeroth we're handing to you an endorsed filed copy of the Information. Would each of you look at that and tell me if your name is correctly stated and spelled, Miss Simeroth?

DEFENDANT: Yes., sir.

THE COURT: And Mr. Brendlin?

[2] DEFENDANT BRENDLIN: Yes.

THE COURT: Thank you. The court will appoint the public defender to represent Mr. Brendlin, and the court will appoint a conflict attorney, Mr. Hansen, to represent Miss Simeroth and both are present for that purpose.

Counsel, do you acknowledge receipt of an endorsed filed copy of the Information, waive full reading thereof, formal arraignment thereon, and full advisement of rights?

MR. HANSEN: Yes, Your Honor.

MR. WARRINER: Yes.

THE COURT: Thank you. Do you wish to have not guilty pleas entered to the counts charged against your client, and as to Mr. Brendlin denials of the alleged prior prison terms, Mr. Hansen?

MR. HANSEN: Yes, Your Honor.

THE COURT: And Mr. Warriner?

MR. WARRINER: Yes.

THE COURT: Thank you. Miss Simeroth and Mr. Brendlin, you have a right to be brought to trial within 60 days of the date the Information was filed. It was filed on December 21st. That means you have a right to have your trial begin not later than February 13, 2002.

Do you understand that, Miss Simeroth?

THE DEFENDANT: Yes, sir,

THE COURT: And Mr. Brendlin?

DEFENDANT BRENDLIN: Yes, I do.

THE COURT: Counsel, what date do you suggest?

MR. WARRINER: Well, we just set the last case on [3] February 13, but I'm going to suggest that we double set these cases. Both Mr. Hansen and I have another trial on that date, but I think it'll workout.

THE COURT: We can do that or we could set it on the 5th. I don't believe either of the two of you have a trial on February 5th. At least in this county anyway.

MR. WARRINER: I do have a trial. Mr. Tibbitts was handling that. It's really my case and I'm going to be doing that trial.

THE COURT: All right. That was not on the calendar with you. I had Mr. Tibbitts, so I'll change that.

Is that agreeable with you, Mr. Hansen, to go with the double set on the 13th?

MR. HANSEN: Yes.

THE COURT: All right. Then this case will be set for trial to begin on February 13, 2002 at 9:00 a.m., counsel in chambers at 8:30, trial readiness conference on February 11, 2002 at 1:30, and pretrial on, counsel, do you have a preference between the 14th or the 22nd of January?

MR. HANSEN: I don't care.

THE COURT: Mr. Warriner?

MR. WARRINER: January 14th.

THE COURT: Pretrial then will be set for January 14th, 2002 at 1:30. Both defendants are ordered present in court on each of those dates and times, and each will remain in custody with bail of 200,000. Thank you.

(End of Proceedings)

---

[4] MONDAY, JANUARY 14, 2002

The matter of the People of the State of California versus Bruce Edward Brendlin, Defendant, Case Number CRF-01-2703, came on regularly before the Honorable Chris Chand-

ler, Judge of the Superior and Municipal Court, for the County of Sutter, State of California, sitting in Department Three.

The People were represented by Brian Aronson, Deputy District Attorney.

The Defendant, Bruce Edward Brendlin, was personally present and represented by Richard Thomas, Deputy Public Defender, acting as his counsel.

The following proceedings were then had:

THE COURT: All right. The trial dates for People versus Bruce Edward Brendlin are confirmed. Trial readiness conference dates are confirmed.

No further pretrials requested?

MR. THOMAS: Correct, your Honor.

---

[5] FRIDAY, FEBRUARY 8, 2002

In the matter of the People of the State of California versus Bruce Edward Brendlin, Defendant, Case Number CRF-01-2703, came on regularly before the Honorable Ann Rutherford, Judge of the Superior and Municipal Court, for the County of Sutter, State of California, sitting in Department Two.

The People were represented by Susan Green, Deputy District Attorney.

The Defendant, Bruce Edward Brendlin, was personally present and represented by Timothy Warriner, Deputy Public Defender, acting as his counsel.

The following proceedings were then had:

THE COURT: The Court at this time is calling CRF-01-2703; and that is the matter of People versus Simeroth and Brendlin.

Mr. Brendlin, that is Bruce Edward Brendlin, is present with his counsel, Tim Warriner. Karen Sue Simeroth is present with her attorney, Mr. Hansen. And Ms. Green is appearing for the People.

Looks like—I got this file transferred over to me at the lunch break, and I had the opportunity to take it with me and read the motion at lunch. We have a motion to supress and the People's motion to continue the jury trial which is set for the 13th. What I have is I have Mr. Warriner for Mr. Brendlin with a motion to supress.

I don't have a motion to supress from Mr. Hansen on behalf of Ms. Simeroth; is that correct?

[6] MR. HANSEN: It is my intention to move to join in.

THE COURT: To join in. Okay.

Do you want to take up the motion to continue first?

MS. GREEN: No.

THE COURT: You want to take up the motion to supress first?

MS. GREEN: Yes; although, I do have an objection to his joining, because the People haven't been given notice.

If we get to the point where we're going to litigate the traffic stop, I don't have a problem with him joining at that time. It's my understanding that's all he's joining on.

I'm not objecting to the cavity search of Ms. Simeroth; but my objection stands until and unless we get to the point where we litigate the traffic stop.

THE COURT: Okay. Is what you're interested in the traffic stop?

MR. HANSEN: Yes.

THE COURT: Number one, can we all stipulate that there was no search warrant?

MS. GREEN: There was no search warrant.

THE COURT: So we can stipulate to that?

MS. GREEN: Yes.

THE COURT: We don't have to put on evidence there was no search warrant?

Ms. GREEN: Yes. There was an arrest warrant—

THE COURT: I understand that.

Ms. GREEN: Okay.

THE COURT: At least I expect I will understand that, let's put that it way.

[7] Next on the list we have an objection to standing on behalf of your client, Mr. Warriner. You have a list of items you want supressed. And the People require that you put on some evidence of your right of privacy and are interested in the items.

MR. WARRINER: I think there's no search warrant. I think it's the People's burden at this point to justify the search where there is no warrant. So I think that is the People's burden.

And if the Court—in terms of standing, one, we have one defendant who's joined in on the standing issue, so I think it becomes a moot point at this point.

In any event, there are cases that support I do have standing. None of these cases are Third District cases; I checked all of them. There's no case from the Third District that says that I have standing. There's no case from the Third District that says I don't have standing. People versus Bell

says I have standing. People versus Grant says I have standing, and People versus Lineburger, the Nineth [sic] Circuit, concludes I have standing.

THE COURT: You don't want to rely on the Nineth [sic] Circuit.

MR. WARRINER: Well, we won't talk about that too much. Well, the one that counts says I do have standing. Ms. Green, she found Cartwright.

THE COURT: How do you supress something you have no interest in?

MR. WARRINER: Well, People versus Bell and Grant and Lineburger say that the passenger in a vehicle, when there's a traffic stop made that is not supported by probable cause, they [8] say that the passenger has sufficient interest to move to supress the evidence.

THE COURT: Supress the stop?

MR. WARRINER: Yes.

THE COURT: Which case are you relying on?

MR. WARRINER: People versus Bell, People versus Grant—

THE COURT: Which page are you on?

MR. WARRINER: This is on the People's response. The People point this out on Page 4 and 5, that Cartwright supports that standing is not always a sure thing when it comes to another passenger. But the People agree that there are other California cases, People versus Bell, Grant and Lineburger that definitely say passengers do have standing.

THE COURT: Only if they're detained.

MR. WARRINER: No; Bell, Grant and Lineburger say passengers have standing if there is a traffic stop without sufficient probable cause.

THE COURT: Ms. Green.

MS. GREEN: He's talking about two different issues. Those cases which he's referring to are talking about the stop. And what the most recent California case says is, a passenger in a car—which relies on a United States Supreme Court case—

THE COURT: There's a very recent case as I recall.

MS. GREEN: Right.—is not detained. And that's an issue, about do we have search issues. Nothing was found on his person. So the issue about whether or not he was detained from the stop is different as to whether or not he has standing to suppress anything found in the car, because nothing was found on [9] him. He doesn't have, the People's position, any standing to supress the lab that was found in the car because he's a passenger.

Also, because he's a passenger, he can't claim he was detained until the officers exerted some force to, you know—actually, in this case, ordering him out at gunpoint. At that point it wasn't a detention; it was an arrest from the time that they contact him.

MR. WARRINER: I think that Ms. Green is confusing the issues. People versus Bell, Grant and Lineburger say when a passenger in a vehicle is pulled over and there's no probable cause, that person is seized, their body is being seized by the police, okay. And those cases say that a passenger—

THE COURT: I think there are cases that say he can get out—

MR. WARRINER: Well—

THE COURT: He can walk away. The door was open; he could have walked.

MR. WARRINER: Well—

THE COURT: Until the officer said "Stop," he wasn't seized.

MR. WARRINER: He didn't have any choice.

THE COURT: Of course he did; he could have walked away.

MR. WARRINER: Well, Your Honor, Bell, Grant and Lineburger don't hold that way.

THE COURT: Anyway—

MR. WARRINER: Cartwright—

THE COURT: The other problem that I'm trying to get to, you're trying to supress these items that are listed on your [10] motion—

MR. WARRINER: Uh-huh.

THE COURT: —but I don't know what interest you have in them.

MR. WARRINER: I am objecting—my objection is that this should not have been a stopped vehicle in the first place, because there was no probable cause. So whatever was found after that is the fruit of the poisonous tree.

THE COURT: I must be missing something. I think you have to put on evidence that you have an interest in the things you wish to supress, as to your client.

MR. WARRINER: He has—my client has an interest in not being seized, not being pulled over by the police.

THE COURT: That's to supress his arrest.

MR. WARRINER: No, that's to supress the traffic stop of the vehicle. If there was no stop, there can't be any arrest, there can't be any evidence, because the vehicle would have gone on about its business. So I think everything hinges on the validity this traffic stop.

THE COURT: Do you want to go ahead and let him get to the traffic stop and see where it goes from there?

MS. GREEN: First I would like a ruling that his client was not detained as a result of the traffic stop because he was a passenger.

THE COURT: I'd have to hear some evidence to know he wasn't detained. As I understand it, I don't think he was detained until the officer pulled the gun and also said, "You're under arrest, I abscond you."

[11] MS. GREEN: I'm not going to—with him before I'm required to put on any evidence.

MR. WARRINER: She just stipulated, and I'll ask the Court to take judicial notice—

THE COURT: She stipulated there was no search warrant. She did not stipulate there was no arrest warrant.

MR. WARRINER: I obviously want to put on evidence. I think it's the prosecutor's burden to put on evidence. But the Court understands where I'm coming from, and we have a slightly different take on it.

THE COURT: I'll just tell the People to call their first witness.

MS. GREEN: Okay.

THE COURT: We'll determine when he got seized.

MS. GREEN: And my objection—

THE COURT: I'm going to hold your objection, pending to ruling.

MS. GREEN: Thank you.

THE COURT: I'll listen to the testimony and I'll make a finding as to if he was seized if ever and as to what—

MS. GREEN: Okay. We would call Deputy Brokenbrough.

THE COURT: Thank you, Ms. Green.

OFFICER ROBERT BROKENBROUGH,

a witness called by the People, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MS. GREEN:

[12] Q. Would you state your full name and spell your last name for the record.

A. Robert Charles Brokenbrough, B-R-O-K-E-N-B-R-O-U-G-H.

Q. What is your occupation, sir?

A. Deputy sheriff.

Q. For Sutter County?

A. Correct.

Q. Were you working on November 27th of 2001?

A. Yes, I was.

Q. Do you recall where you were at approximately 1:40 a.m.?

A. Yes.

Q. Where were you?

A. Would have been on Franklin, right around south Barrette.

Q. Okay. Were you traveling with anybody—or were you in a patrol car?

A. Yes, I was.

Q. Was anyone else with you?

A. Yes.

Q. Who was with you?

A. That would have been Cadet Janessa Taber.

Q. And at some point around that time was your attention drawn to a 1993 brown Buick Regal?

A. Yes, it was.

Q. Would you tell me about that, please?

A. Yes. The vehicle was also traveling in front of me. It was eastbound on Franklin. I saw that the registration had expired as of November; and in addition, there was also a temporary DMV sticker in the window.

[13] Q. When you said that the registration had expired, what exactly were you looking at on the vehicle to come to that conclusion?

A. The tab on and the year on the license plate itself.

Q. There was a month tab?

A. Yes.

Q. Do you recall what year the month was for?

A. Nine.

Q. Would that relate to the month of September?

A. Yes.

Q. Was there a year on the vehicle?

A. Yes.

Q. What year tab was there?

A. It was red and it was 01.

Q. Okay; and that would relate to 2001?

A. Correct.

Q. Then you had indicated that you saw something in the window?

A. Yes.

Q. What did you see in the window?

A. A paper, a red-colored temporary sticker in the window.

Q. Okay. Are you familiar with the item you saw in the window?

A. Yes.

Q. And what did you think it was?

A. I'm sorry; can you—

Q. Did you know what the item was or did you think it was something?

A. Yes; it's a temporary sticker from DMV.

Q. And was there a number reflected on that sticker?

[14] A. Yes, there was.

Q. And what was it?
A. 11, for November.
Q. Does that correspond to a particular month?
A. Yes.
Q. Was that November?
A. Yes.
Q. What did you do after observing these two things on the vehicle?
A. Made a traffic stop on the vehicle for the vehicle being expired.
Q. When you made the traffic stop did the vehicle stop?
A. Yes.
Q. Did you get out of your car?
A. Yes.
Q. Did you approach the vehicle?
A. Yes.
Q. What side did you approach?
A. On the driver's side.
Q. Did you contact the driver?
A. I did.
Q. Who was the driver?
A. A female, Karen Simeroth.
Q Do you see that person in the courtroom today?
A. I do.
Q. Would you please point her out and describe what she's wearing and where she is sitting.
A. She's sitting in the jury box, left of her attorney, wearing [15] the orange sweater and striped pants.

THE COURT: The record will reflect Ms. Simeroth has been identified.

MS. GREEN: Thank you, Your Honor.

Q. Did you notice whether or not there was anyone else in the vehicle besides Ms. Simeroth?
A. Yes.
Q. Was there another person?

A. Yes.

Q. How many others?

A. One other person.

Q. Where was that person?

A. Sitting in the passenger seat.

Q. Did you recognize that person?

A. Yes.

Q. Okay. How did you recognize him?

A. I knew that it was either Scott or Bruce Brendlin from prior arrests or contact that I've had.

Q. Okay. When you spoke with Ms. Simeroth, did you ask her for any type of identification?

A. I did.

Q. What did you ask for?

A. I asked for her driver's license.

Q. Did she provide that to you?

A. Yes, she did.

Q. While you were speaking with Ms. Simeroth, did you have a conversation with the front passenger?

A. Yes.

[16] Q. What did you talk to him about?

A. I asked the passenger to identify himself, and he verbally identified himself as Bruce Brown.

Q. Did he provide you with any type of ID?

A. No.

Q. Do you see the person, this passenger, here today?

A. Yes.

Q. Would you please point him out, describe what he's wearing and where he's sitting?

A. Sitting at the defense table next to his attorney, wearing the orange sweater and striped pants.

THE COURT: The record will reflect Mr. Brendlin has been identified.

MS. GREEN: Thank you.

Q. After you had received Ms. Simeroth's driver's license, what did you do?

A. I put Bruce Brendlin's name over the radio, and I was aware that one of the Brendlin brothers was a parolee at large. Ultimately Officer Baker of the Yuba City Police Department responded back that he believed Brendlin was a parolee at large and was absconding.

Q. And did your dispatch do anything in relation to the name Bruce Brendlin?

A. Yes; I contacted my dispatch and gave them the name Bruce Brendlin, had them check, and immediately they confirmed that Bruce Brendlin was a parolee at large.

Q. Did you also have dispatch check anything with Simeroth?

A. Yes.

[17] Q. What did you have them do with regard to her?

A. Had them check to see if she had a valid license as well as any warrants.

Q. Now, how soon after you contacted Ms. Simeroth in the driver seat did you call to have them check on a warrant for Mr. Brendlin or—

A. Would have been one to two minutes.

Q. Okay. How long after you called dispatch with this request did Brian Baker, the Yuba City police officer, call you back on the radio?

A. As soon as he heard me identify the passenger, he immediately responded that Bruce Brendlin was a parolee at large.

Q. And how long did it take for dispatch to confirm the warrants for you?

A. I would say right around a minute.

Q. During the time that you were waiting for the warrant to be confirmed, did you observe anything with respect to the car doors?

A. Yes.

Q. What did you observe?

A The passenger door opened and then immediately shut.

Q. Was this a two-door car?

A. Yes.

Q. Okay. After you received confirmation from dispatch that there was a warrant for Mr. Brendlin, what did you do?

A. Prior to that—I requested back up at that point, and Deputy Ramos arrived, and Bruce Brendlin was taken into custody at gunpoint.

[18] Q. Describe for me what you did exactly, please?

A. Withdrew my duty weapon, stood by the passenger door of my patrol car, pointed it in the direction of Bruce Brendlin, and verbally ordered him out of the car at gunpoint.

Q. And was that the first time you issued a command to him during the entire traffic stop?

A. Yes.

Q. Okay. Did you have any other conversation with him prior to that other than asking him what his name was?

A. No.

MS. GREEN: Your Honor, did you want me to just proceed through the rest of the hearing?

THE COURT: I guess so.

MS. GREEN: Okay.

THE COURT: Because to rule on one specific issue as we went, I'd have to do cross-examination.

MS. GREEN: Okay.

Q. You order him out of the car at gunpoint. Where does he—where do you take him after that?

A. I immediately arrest him and place him in the back seat of the patrol car.

Q. Okay. After you place Mr. Brendlin in the back of the patrol car, what do you do?

A. Do a search incident to the arrest on Mr. Brendlin.

Q. Okay. You searched his person?

A. Yes.

Q. Did you find anything on his person?

A. Yes.

[19] Q. What did you find?

A. Located an orange syringe cap.

Q. I want to jump back in time for a second.

During the time you were speaking with Ms. Simcroth at the driver side door, did you notice anything in the car that—inside the car that peaked your interest?

A. Yes.

Q. What was that?

A. There was one or two containers of Brayclean (phonetic) cleaner.

Q. And why was that of interest to you?,

A. If anything, it just perked my interest because that is something that I understand is used for manufacturing.

Q. Okay. And are you familiar—you said you were familiar with the Brendlin brothers through prior contacts?

A. Yes.

Q. Were you familiar in particular with Bruce Brendlin's criminal history?

A. I don't know, to be honest with you. I've arrested both of them before. I know that both of them have been associated with either weapons or narcotics.

Q. Okay. After arresting and putting Mr. Brendlin in the back of the patrol car, do you recontact the driver?

A. Yes.

Q. Is she still sitting in the car at this time?

A. Yes.

Q. When you recontact her, do you ask her to get out of the vehicle?

[20] A. Yes.

Q. Okay. What happens next?

A. She exited the vehicle, and I asked her to walk to the front of my patrol car, which she does.

Q. Okay. When you get to the front of your patrol car, what do you do?

A. As I started talking to her, she begins to place her hands in and out of her coat pockets; she's wearing a black bulky jacket.

Q. And do you say anything to her about that?

A. Yes.

Q. What do you say?

A. I asked her if she had any weapons inside her pockets.

Q: And what does she say?

A. "No."

Q. Does she continue—well, do you direct her to do anything with her hands?

A. Yes, I believe I told her to keep her hands out of her pockets, at which time the hands went back inside the pockets of the jacket.

Q. Now, at the point you're having this conversation with her, who else is on the scene?

A. It would have been Deputy Ramos, Officer Baker and Officer Hansen and Cadet Taber as well as Deputy Emerson.

Q. Deputy Emerson is another Sutter County deputy?

A. Correct.

Q. After you tell her to keep her hands out of her pockets, and she puts her hands back in, what happens next?

[21] A. I asked her again if she had any weapons in her pockets and she replied, "No."

Q. Then what happened?

A. I then proceed to do a pat down search for officer safety.

Q. Describe for me how you began your pat down?

A. I asked Ms. Simeroth to place her hands on top of her head, at which time I grabbed her hands with my left hand and began to do a pat down search with my hand.

Q. What is she doing during the time you're in a pat down search with your hand?

A. Initially she's standing there. As the pat down search progressed, she's moving to the right, away from me.

Q. Okay. Are you directing her to do anything when she's moving to the right?

A. Yes; she was told to stand there.

Q. Did she do that?

A. No.

Q. What did she do?

A. She continues to move to the right to avoid being searched.

Q. Okay. At some point during the time that you're patting her down, does Deputy Emerson direct your attention to something?

A. Yes.

Q. What does he direct your attention' to?

A. Deputy Emerson told me from his location he could see something in her waistband.

Q. Okay. Do you attempt to do anything in response to that information?

A. Yes.

[22] Q. What do you do?

A. I proceeded to run my fingertips along her waistband, at which time I felt some type of a bulky object inside of her waistband of her sweatpants.

Q. Okay. What is she doing at the time that you feel something in the waistband of her pants?

A. Still resisting.

Q. How is she resisting?

A. Moving to the side, moving to the right.

Q. Okay. Are you able to retrieve what's in the waistband of her pants?

A. Yes.

Q. How do you do that?

A. She is actually restrained by Deputy Ramos, and ultimately Cadet Taber retrieved the item from her waistband.

Q. Cadet Taber is a female?

A. Correct.

Q. Did you look at the items that were retrieved from her waistband?

A. Yes.

Q. What do you find?

A. Two syringes, one did not have a syringe cap on it, and a plastic baggy containing a green leafy substance.

Q. What do you do at that point?

A. Retrieve those items, and secure her, and place her in handcuffs.

Q. Okay. After arresting her, does she go in one of the patrol cars?

[23] A. Yes.

Q. Okay. Did you search the vehicle?

A. Yes.

Q. Okay. What do you find in the vehicle?

A. There was—I believe it was either a green- or blue-colored Rubbermaid container. I searched that. Inside that container there was tubing, a scale, and other items. In addition, there was a Nine Lives cat—either a cat litter container—it was a plastic container, and inside that was a liquid. And that container was completely sealed with gray duct tape.

Q. The Rubbermaid container that had the scale and the glassware, where was that located in the vehicle?

A. It was on the seat directly between the driver and passenger of the vehicle.

Q. What about the Nine Lives plastic container?

A. Same thing, it was on the seat.

Q. In the Rubbermaid container did you find any tin foil?

A. Yes.

Q. Did you find any filter papers?

A. Yes.

Q. Now, after seeing what was in the Rubbermaid container and the solution in the Nine Lives container, did you request the assistance of somebody?

A. Yes.

Q. And who was that?

A. I requested Net 5 be called out, and ultimately they responded.

[24] Q. Okay. who's Net 5?

A. It's the Yuba-Sutter local narcotics enforcement.

Q. Okay. So something in this Rubbermaid container and the Nine Lives container led you to believe this was possibly narcotics?

A. Correct.

Q. Did you also search a purse that you located in the vehicle?

A. Yes.

Q. Where was that purse located?

A. The purse was located on the front passenger seat.

Q. And what did you find in the purse?

A. Hypodermic syringe.

Q. Was there any identification in the purse?

A. Yes.

Q. And who was it for?

A. Simeroth.

Q. Prior to the time that you arrested Ms. Simeroth, had you asked her to search the vehicle?

A. Yes.

Q. Okay. And what did she say when you asked her to search the vehicle?

A. I believe I asked her if there was anything illegal inside the vehicle, and she said no, however, she had not been driving it most of the day.

Q. Did she ever answer you yes or no with regard to your question to search?

A. I don't think she did.

Q. At some point did you call dispatch and request that the [25] registration be run?

A. Yes.

Q. And what information did you receive with regard to that?

A. Dispatch advised that the vehicle was expired as of September 27, '01, with an application in process.

Q. Sometime later did you—I'm sorry—strike that.

Deputy Ramos, did he transport Ms. Simeroth to the jail for you?

A. Yes.

Q. Sometime after she was transported to the jail did he provide you with something?

A. Yes.

Q. What did he provide you with?

A. He provided me with a-large plastic baggy; and inside this bag was another plastic baggy containing a white powdery substance and another plastic baggy containing a green leafy substance.

MS. GREEN: No further questions.

MR. WARRINER: Okay.

CROSS-EXAMINATION

BY MR. WARRINER:

Q. When you first saw this vehicle you were traveling in your patrol vehicle?

A. Yes.

Q. And you had a cadet with you; is that right?

A. Yes, correct.

Q. You were in a marked patrol vehicle?

A. Yes.

[26] Q. And this had rack lights on the top?

A. Yes.

Q. Okay. And then you basically—you followed the vehicle that Simeroth and Brendlin were in for some period; is that right?

A. Yes.

Q. Okay. Because you made some observations about the registration tags?

A. Yes.

Q. And you were making those observation as you were following the vehicle?

A. Yes.

Q. And one of the observations you made is that the small tag that's affixed to the license plate was expired?

Is that what you're saying—

A. Yes.

Q. —that that registration tag was expired?

A. Yes.

Q. Now, you referred to a DMV temporary sticker that you saw, do you recall that?

A. Yes.

Q. Okay. And what that is is [sic] a DMV temporary registration sticker; is that true?

A. I refer to it as a DMV sticker.

Q. You don't like to use the word "registration" with that sticker?

A. I'm sure it's probably called that, but I refer to it as a DMV sticker.

[27] MR. WARRINER: Can I approach, Your Honor?

THE COURT: You may.

MR. WARRINER: I'd like to have this marked. I think this is consistent with what is in the Court's packet.

THE COURT: It's actually called a temporary operating permit.

MR. WARRINER: Temporary operating permit, okay.

(Defense Exhibit A was marked for identification.)

BY MR. WARRINER: Q. Okay, Officer, I'm showing you Defense Exhibit A, and I want you to look at that. Do you recognize that?

A. I recognize the temporary sticker and the 11 on it, that's it.

Q. Okay. Is what's depicted in that exhibit that you're looking at, is that consistent with what you observed on the 27th of November, 2001?

A. I would say so. The writing and the date at the bottom, that's unknown.

Q. Okay. And you have seen those stickers before?

THE COURT: May I see that?

THE WITNESS: Yes, Your Honor.

(Pause.)

THE WITNESS: Yes, I have.

BY MR. WARRINER: Q. And—okay. And you don't use the word "registration"; but basically that sticker has something to do with allowing the vehicle to operate on the roadways and highways of the state, is that true—

A. Yes.

[28] Q. —when that sticker is given to you?

MS. GREEN: Objection; calls for a legal conclusion.

THE COURT: Sustained.

MR. WARRINER: Okay.

Q. Do you know what that sticker means?

A. My understanding is that when a vehicle is expired, a person can go in to DMV and obtain that sticker, but there is still is other items that need to be taken care of before that vehicle can drive.

Q. So you're saying even if you have that sticker you can't drive?

A. That's my understanding.

Q. Okay. So it is your practice if you saw any car with a sticker like that in the exhibit I've just shown you, and an expired tab on their license plate, you feel that you would be able to pull them over?

A. I believe I would have to verify whether or not that sticker belonged to that vehicle.

Q. Okay. So just looking at the sticker, you're saying that's not good enough, you would actually have to pull them over and conduct a verification?

A. Correct. Based on my experience, over 11 years, with the sticker, its not being a fixed object—it's paper—it's tape—

Q. Uh-huh.

A. —people are—have been known to remove it to avoid paying penalty fees.

Q. Okay. And so you've seen cases of these removed stickers?

[29] A. Yes.

Q. Have you seen cases of removed stickers such as that sticker shown in the exhibit I've shown you?

A. I'm sorry?

Q. In other words, these temporary stickers. When we're talking about cases of removing stickers, are you talking about these temporary stickers?

A. Yes. People have removed stickers to avoid paying penalties, yes.

Q. What about the little sticker, the license plate tab, do people remove those and switch them around on vehicles?

A. They do.

Q. There's no difference between that little sticker and this temporary sticker in the Defense exhibit I've shown you; is that right?

A. If I understand your question correctly, people will put false tabs on license plates.

Q. Right.

A. They will put false temporary stickers in a window, okay.

Q. Right.

A. Whether it's the case in this case, I don't know.

Q. And when you were traveling down the road, and when you were traveling behind the vehicle that Brendlin and Simeroth were in, you didn't know if in fact that temporary sticker was a false sticker?

A. That's correct.

Q. And did you—I mean, there was nothing about the sticker, the way it was affixed in the vehicle that made you suspect that [30] it was wrongfully placed in the vehicle? Was there anything unusual about the sticker, the way it was placed on the vehicle?

A. No.

Q. Okay. You didn't see it peeled away or if it was put up sort of haphazardly?

A. It's also 1:30 in the morning or so, so, yes.

Q. Okay. So 1:30, at that time, that has significance for you?

A. It's dark outside; so therefore, it was unlike daylight, where your advantage of seeing the sticker would be a lot better.

Q. Okay. Yeah, right.

Given the conditions at 1:30 in the morning, it wasn't that light, you didn't see anything to make you think that sticker shouldn't have been on the vehicle?

A. Correct.

Q. All right. And then you were traveling down the road, and you're observing the sticker, and there's some point where you put on your rack lights; is that right?

A. My overheads, yes.

Q. Overhead lights?

A. Yes.

Q. And do you put on a siren, too?

A. No.

Q. Okay. You put on your overhead lights and that's when you effect this traffic stop with the vehicle?

A. Yes.

Q. This is just on a street here in town; is that right?

A. Yes.

Q. Okay. And do you pull up behind the vehicle or on the side [31] of the vehicle?

A. Behind the vehicle.

Q. And when you pull up behind the vehicle you still leave your lights on; is that correct?

A. Correct.

Q. And do you—at that point do you run the license plate—do you radio that license plate in to dispatch so they could do a check on the license plate?

A. No.

Q. Did you do anything like that immediately when you stopped the vehicle?

A. Yes. The plate was ran, yes.

Q. So that's pretty much standard operating procedure, right, if you stop somebody you're going to radio in their license plate to dispatch so you have this check going on them?

A. Yes.

Q. And you did that?

A. Yes.

Q. That takes a few seconds. How long does it take, what do you?

A. Depends on how busy dispatch is.

Q. Sure. Do you recall in this case what you did when you radioed that information in?

A. No.

Q. But that occurs after you stopped the vehicle, the vehicle in front of you. And then you make this radio call; is that right?

A. No.

[32] Q. No. It happened as you were—when did it happen?

A. An unknown time before the actual stop itself. Originally the vehicle—I saw the vehicle at Circle K.

Q. Okay.

A. The vehicle was parked at a pay phone. I didn't see the occupants. I ran the plates and they came back expired. At that time my partner and I did something else; and ultimately while we were traveling on Franklin Road, the vehicle was in front of us.

Q. Okay. So it sounds like you ran the plate some time ago basically?

A. Yes.

Q. This was at Circle K?

A. Yes.

Q. Was there something about the vehicle that caught your eye at Circle K?

A. The expired tags on the vehicle.

Q. Okay.

A. At that point didn't see the temporary sticker.

Q. Okay.

THE COURT: Dispatch had already radioed you back before you ever saw the car the second time, that the registration was expired?

THE WITNESS: That is correct.

THE COURT: Okay.

BY MR. WARRINER: Q. But at the time you pulled the vehicle over, at that point you had seen that red tag; is that right?

A. Yes.

Q. When we refer again to that exhibit in front of you, and [33] also to your recollection, it had Number 11 on the vehicle you pulled over; is that right?

A. Yes.

Q. That 11 refers to a month?

A. Yes.

Q. Yes. That would mean for the eleventh month, November, that that vehicle could operate? Is that your understanding?

A. I don't know if there is an ending date, if there is a specific date within that month.

Q. Right; but your understanding is that the 11 means a month?

A. That's correct.

Q. And if it were—if the month were—if it were December, and you had a temporary sticker that had 11 on it, what would you think?

A. I'm sorry?

Q. Okay. Let's say this happened in December. Okay?

A. Okay.

Q. And if you ran upon a vehicle that had a temporary sticker with the number 11 on it—

A. Okay.

Q. —what—how would you treat that situation?

A. That it would be expired.

Q. Okay.

THE COURT: For the record, it reads: "This permit expires on the last day of the month indicated by the bold white number."

MR. WARRINER: All right.

Q. Then I think we got off track; but I was talking about how [34] you pulled over the vehicle and you put on your lights. Is that what you said, you put on your lights?

A. Yes.

Q. And you said by the time you pulled over the vehicle you had already radioed the license plate into dispatch?

A. Correct.

Q. So you already had this information in your mind?

A. Correct.

Q. So when you had pulled over the vehicle then did you immediately get out of the vehicle?

A. Well, I mean I have to put the vehicle in park; and ultimately, yes.

Q. Sure, within reason.

I'm wondering, did you radio in any other information immediately after you stopped the vehicle?

A. When the vehicle was stopped, either myself or my partner radioed the license plate, the description and the location.

Q. Okay. So that was the second time you radioed in information about this vehicle to dispatch?

A. Correct.

Q. Okay. And then it was after you did that is when you got out of your vehicle and approached the vehicle?

A. Yes.

Q. Now, the partner with you was a cadet?

A. Correct.

Q. Did the cadet stay in your vehicle or did the cadet get out of your vehicle and walk up to the Simeroth vehicle?

A. She did not.

[35] Q. She stayed in the car?

A. She either sat in the car or she was standing by the door.

Q. All right. And when you approached the vehicle, you were parked behind the vehicle?

A. Yes.

Q. And the—and your flashers were going—your police lights were going?

A. Yes.

Q. Did you put on your spotlight, that powerful bright light?

A. I did.

Q. And did you use that to effect the stop—as a way to effect the stop by putting that light on?

A. No.

Q. Okay. But after your vehicle was stopped and Simeroth's vehicle was stopped, then you applied that light; is that correct?

A. Yes.

Q. And is that light—what was the purpose of applying that light at that time, the vehicle was already stopped?

A. Well, we're talking—it's 1:30 in the morning, so obviously the spotlight is used so I can see the vehicle.

Q. Okay. So to illuminate this whole area?

A. Correct.

Q. All right. All right. And you were in your police uniform too; we're assuming you were?

A. Yes, with my duty belt.

Q. And you had a gun on, right?

A. Yes.

[36] Q. Did you have your gun drawn?

A. At what point?

Q. Well, I mean we're saying this is at 1:30 in the morning, right?

A. Yes.

Q. And you're approaching the car alone; is that right?

A. Yes.

Q. Did you undo the snap on your holster?

A. No.

Q. Did you have your hand by your gun, you know, as if you were ready just in case something happened?

A. I might have had my hand by the gun.

Q. Okay.

A. I might have even placed my hand on the gun for officer safety; I never know what the driver or occupants are going to do.

Q. Okay. Right. And that's part of your training, because you're being careful when you approach a vehicle because you don't know what's going to happen?

A. Correct.

Q. As you approached the—driver's side or passenger side?

A. Driver's side.

Q. That was Ms. Simeroth's side?

A: Yes, she was driving the vehicle.

Q. And also, when you pulled the vehicle over, did you ever get on that little speaker—and I've had officers do that, get on their speaker and say something to you like, "Pull over," or "Stop your vehicle."

[37] A. I didn't.

Q. When you pulled the vehicle over, did you see the occupants in the vehicle doing anything inside the vehicle?

A. No.

Q. Did you make any orders to the occupants of the vehicle, such as "Stay put, Put your hands up," or anything?

A. I did not.

Q. Did you—did they roll down the window? Was the window rolled down?

A. I don't recall, other than when I approached the vehicle the window was down, I believe.

Q. Okay. Did either—anyone from the passenger side or driver's side try to open the door or get out of the vehicle?

A. Yes, at one point the passenger door opened.

Q. Okay. And when was that point?

A. After the vehicle was stopped.

Q. Okay. Well, was it after you contacted Simeroth?

A. Yes.

Q. Okay. And was it after you looked and seen that Brendlin might be somebody you might have recognized?

A. Yes.

Q. All right. So then you approach the driver's side; and did you ask the driver for identification?

A. I did.

Q. And did you shine your light into the passenger—into the compartment of the vehicle?

A. Yes.

Q. And at that point did you radio that information in to [38] dispatch, the driver's information?

A. No.

Q. Did you ask for the passenger's information at that point?

A. I asked who the passenger was; he identified himself verbally. I didn't ask for any identification or a wallet or anything like that.

Q. And when you did that you were still on the driver's side of the vehicle?

A. Yes.

Q. Did you ever go to the passenger side of the vehicle and the passenger and ask any questions on that side?

A. No.

Q. No. It was all done through the driver's side?

A. Yes.

Q. Didn't you eventually go over to the passenger side because you got Mr. Brendlin at—

A. Yes, after it was confirmed he was a parolee at large, he was ordered out at gunpoint and ultimately taken into custody at that time.

Q. I asked a question about the gun. You didn't—there was a point that you learned he apparently had a warrant; that's when you used the gun at gunpoint?

A. That's correct.

Q. You didn't bring the gun out before then?

A. Did not.

Q. Okay. After you asked Ms. Simeroth for her identification, what did you do immediately after that, do you recall?

A. Identified who the passenger was, obtained his name—

[39] Q. Okay.

A. —and ultimately walked back to my patrol car.

Q. Why did you walk back to your patrol car as opposed to staying there with the occupants of this vehicle?

A. To run the information that they provided.

Q. And you were going to run it in your computer that you have in your car?

A. No, our vehicle is not equipped with—

Q. I guessed so. But you were going to radio it back in to dispatch?

A. Correct.

Q. You went back, sat in your car, and you radioed this information in?

A. No, actually I stood at the rear of my patrol car or—at the rear of—or at the passenger door of my patrol unit, and that's when it was radioed in.

Q. And this whole time while you're doing this the red lights are going on your police vehicle?

A. Correct.

Q. And the large—what is that called, the bright light?

THE COURT: Spotlight.

MR. WARRINER: Spotlight.

Q. That's on as well?

A. Yes.

Q. And then—so you radioed this information in. And did you get a response back from dispatch?

A. Yes, eventually.

Q. Once you got that response what did you do?

[40] A. I was told Brendlin was the parolee at large, and he was taken into custody.

Q. Okay. From the point where you asked Ms. Simeroth for her identification and asked Mr. Brendlin to identify himself, to the point where you learned that Mr. Brendlin had a warrant for his arrest, approximately how much time went by?

A. A couple minutes.

MR. WARRINER: All right. No further questions.

THE COURT: Mr. Hansen.

MS. GREEN: Oh, sorry.

THE COURT: He's interested in the traffic stop.

CROSS-EXAMINATION

BY MR. HANSEN:

Q. Deputy Brokenbrough, you said you saw this vehicle at Circle K?

A. Correct.

Q. What time of day was that?

A. I don't remember offhand.

Q. The same evening?

A. Yes.

Q. Hours before?

A. Yes.

THE COURT: Was it already dark when you saw it at Circle K?

THE WITNESS: Yes, it was. Yes.

BY MR. HANSEN: Q. And you saw the license—the license plate and sticker on the license plate at that time?

A. Yes.

Q. And you did not see the red sticker with the 11 on it at [41] that time?

A. I did not.

Q. Where was the sticker, the red sticker with the 11 on it, placed in the car?

A. It was placed on the back windshield.

Q. Windshield?

A. The rear window of the vehicle, at the—I want to say the driver's side, lower corner.

Q. Do you have any knowledge of what the Vehicle Code requires for placement of a sticker like that?

A. I don't.

Q. Do you know if it has to be any particular location on the car?

A. My understanding is that it has to be either on the rear window or the front windshield, visible.

Q. And it was on the rear window?

THE COURT: When you say rear window, I don't know what you mean; like the rear passenger window, rear driver window?

THE WITNESS: The back of the car, the back window of the vehicle.

THE COURT: The back?

THE WITNESS: Yes.

THE COURT: Okay. Like the rear windshield or whatever you want to call it. Okay, thank you.

BY MR. HANSEN: Q. The window in the back that goes from side to side?

A. Yes.

Q. Above the trunk?

[42] A. Yeah.

THE COURT: So the one that doesn't open?

THE WITNESS: That's correct.

BY MR. HANSEN:

Q. And that's where the sticker was?

A. Yes.

Q. Now, the license plate was also on the back of the vehicle, wasn't it?

A. Yes.

Q. So when you're looking for the first time and seeing this license and getting the information off it, why couldn't you see the red 11 sticker?

A. I don't know, other than from the way the car was positioned, the way it was parked. What caught my—initially caught my eye was the color of the year. And with that being an expired tab, that caught my attention. At that point I ran the plate, I didn't see the sticker.

Q. Okay. The color of the year, that wasn't expired yet, was it? It wasn't a 2001 sticker?

A. It was '01, but it was also September. Since we were in November—

Q. But the year was okay?

A. Yes.

Q. But you say there was a September sticker on it?

A. Yes.

Q. So you ran that information. And it came back expired?

A. Yes.

Q. And you got some additional information besides the fact it was expired, didn't you?

[43] A. Yes.

Q. And what was that?

A. Application in process.

Q. And was that the only thing you were told, application in process?

A. Besides the registered owner—I don't know if I understand the question.

Q. What did the application in process mean to you?

A. To me that means that there are still other things that are needed to lawfully drive that vehicle.

Q. And it was not your understanding that the type of sticker represented by the red sticker with 11 on it gave permission to a person to drive that vehicle?

A. It very well may, but I still need to verify whether that sticker belongs to that vehicle.

Q. Who said that?

A. I don't know who said it; but with my experience, knowing that people will avoid paying, you know, registration—they will affix the false sticker tab to avoid paying penalties, whatever the case may be.

Q. When you saw the vehicle you said there were no people around at that time?

A. I didn't see anyone.

Q. Had you seen the vehicle before that time?

A. No.

Q. Did you know Ms. Simeroth?

A. I don't think I've had any contact with her.

DEFENDANT SIMEROTH: You have.

[44] MS. GREEN: For the record, that was Defendant Simeroth.

THE COURT: Thank you.

BY MR. HANSEN: Q. when you saw the vehicle later, could you clearly see the sticker with the 11 on it?

A. Yes.

Q. So you knew it was there at the time you were following it?

A. Yes.

Q. You said you called the information in again?

A. That would have been sometime after the fact.

Q. All right. So as you're following the vehicle, it's before you stop, but you don't call it in again?

A. Correct.

Q. You didn't call in to ask dispatch if it was a temporary license by virtue of the tag with the number 11/00 on it?

A. Correct. I went on what dispatch had told me earlier.

MR. HANSEN: I don't have any other questions.

REDIRECT EXAMINATION

BY MS. GREEN:

Q. When you ran the car at Circle K, dispatch informed you that it was expired, application pending?

A. Yes.

Q. Is there something about the information that was provided to you at that time—did they provide you the name of the registered owner at the time you ran the car?

A. Yes.

Q. Who did they tell you was the registered owner?

A. Gail Tonner or Gail Tonner.

Q. When dispatch came back with that information did you [45] recognize that name?

A. Yes.

Q. How did you recognize it?

MR. WARRINER: Objection; hearsay.

THE COURT: I'll overrule it.

BY MS. GREEN: Q. Have you had some personal contact with Gail Tonner?

A. Yes.

Q. Tell me about it.

A. When I was assigned to detectives,-I had investigated where she was a victim of a theft of a handgun.

Q. Okay. So when they came back with the registration information, expired, application pending, and gave you the owner's name, you were kind of like, oh, I know who that is?

A. Yes.

Q. Was it 11 years you've been a police officer?

A. Over 11 and a half.

Q. Okay. In your experience, have you known—have you, in your experience as a police officer, known that

temporary tags, the ones we're talking about in the rear window, have been stolen out of people's cars?

A. Yes.

Q. And people report them as being stolen?

A. Yes.

Q. That's also true of this tab you put on your car or license plate?

A. Yes.

Q. Have you had experience with people falsifying those rear [46] window stickers?

A. Yes.

Q. Like making them up?

A. Yes.

Q. Okay. Have you—do you have any experience with people having expired—like it matches their car but it's from like two years ago, in the window?

A. Yes.

Q. Okay. The temporary tag that's stuck in the back of the window, how are those put back in the window, do you know?

A. I'm assuming with tape.

Q. Okay. So you're familiar with registration tabs that you put on the license plate?

A. Yes.

Q. And those come self-sticky from the Department of Motor Vehicles when they're mailed to you?

A. Correct.

Q. That's different from the tags that you put in the back of the window?

A. When we're talking about tabs, tabs have some type of adhesive that sticks to the plate; therefore, when those are removed, whatever the case may be, there's usually some type of evidence.

Q. They're also pretty sticky aren't they?

A. Yes.

Q. Hard to get off?

A. Yes.

Q. Do you have that photograph in front of you there? If I [47] could see that.

(Pause.)

BY MS. GREEN: Q. Showing you Defense Exhibit A, there's some writing on this, I'd like you to read to me what's written on that tag, starting with "fees."

A. "Fees to register this vehicle or vessel have been made to the State of California, Department of Motor Vehicles. This permit must be supported by either, one, a Department receipt or—the receipt number and the receipt number shown on this permit must agree; or 2, a letter issue used by the Department confirming the issuance thereof of a permit."

Q. In the back window—did you see a receipt taped to the back window?

A. No.

Q. Did you see a letter from DMV taped on the back of the window?

A. No.

Q. Would those be items you could see from your patrol car when you're driving behind the vehicle?

A. Yes.

Q. You could see those items if they were taped on?

A. Yes.

Q. Would you be able to read them from your patrol car?

A. No.

Q. Okay. There's—also taking a look at Defense Exhibit A, there's an area for license plate number; is that right? There is a blank line where you fill out this information?

A. Yes.

[48] Q. There's also space for an engine number; is that right?

A. Yes.

Q. What's an engine number?

A. That would be the number that's stamped on the engine.

Q. Is that different from a VIN number?

A. I would assume so, but I don't know for sure.

Q. Okay. And there's also an area to write a receipt number a blank line; is that right?

A. Yes.

Q. Okay. So prior to the time that you stopped the car, dispatch had informed you that the tags were expired when you ran the license plate; is that right?

A. Yes.

Q. And the information that they provided, you matched the tabs that were on the vehicle; is that right?

A. Yes.

Q. Okay. And then sometime after the stop you ran the vehicle again and it again—they told you it was expired?

A. Correct.

Q. Now, after you approached the vehicle and you saw Mr. Brendlin or someone you recognized as one of the Brendlin brothers, did that cause you some concern?

A. Yes, only because I knew one of them was a parolee at large; I didn't know which one at that point.

Q. So at the point that you saw him in the vehicle, you had some concern about "parolee at large." Was there anything in particular about—well, you had previously said that you were familiar with them through weapons and possibly drugs?

[49] A. Yes.

Q. Okay. During the time that you're waiting to have confirmation on the warrant, and the door opens, do you have any concerns then?

A. Yes.

Q. What are your concerns?

A. That he is either going to flee from that location from the vehicle itself—

Q. Okay. When the warrant is confirmed—strike that.

You said you called for backup before the warrant was confirmed?

A. Yes.

Q. Why?

A. Mainly because I didn't know, number one, if this was the parolee at large; and if it was, I wanted a second unit there.

Q. Okay. So is it fair to say, then, that once you approached the car and recognized the passenger, that the issue about the license plate really became secondary?

A. Correct.

MS. GREEN: No further questions.

THE COURT: Mr. Warriner.

RECROSS-EXAMINATION

BY MR. WARRINER:

Q. I'm having another exhibit marked, which is another exhibit in the Court's—yeah.

(Defense Exhibit B was marked for identification.)

BY MR. WARRINER: Q. I'm showing you Defense Exhibit B; do you recognize that?

[50] A. Yes.

Q. Okay. What does that look like to you?

A. It's a photograph pertaining to the vehicle I stopped.

Q. And what do you see contained in the rear window?

A. A temporary operating permit with the number 11.

Q. And does that look like it was that night or that early morning when you stopped the vehicle on the 27th of November?

A. Yes.

Q. And—well, let me see the picture.

And is that in the same location that it was in?

A. As long as it hasn't been moved.

Q. But it looks right to you?

A. Yes.

MS. GREEN: With "location," we're talking about the location of the sticker?

MR. WARRINER: Obviously it's not the vehicle.

MS. GREEN: I wanted to confirm for the record because that's not clear.

MR. WARRINER: Yeah.

Q. And it's true on the night and early morning when you stopped the vehicle there was nothing about the sticker that made you think that that sticker on Defense Exhibit B was stolen?

A. That's correct.

MR. WARRINER: No further questions.

THE COURT: Mr. Hansen.

MR. HANSEN: Yes, briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. HANSEN:

[51] Q. When you saw the car the first time at Circle K, did you go up and look in it?

A. No.

Q. You could have tagged it right then, couldn't you?

A. I could have.

Q. You could have written it and left a citation on the windshield?

A. Yes.

Q. But you chose not to?

A. We either got dispatched to another call—but got rerouted some how.

Q. And you didn't go up and look at the car?

A. No.

MR. HANSEN: Nothing further.

MS. GREEN: Nothing further.

THE COURT: Okay. You may step down.

THE WITNESS: Thank you.

MS. GREEN: I'd ask that he remain.

THE COURT: Next witness.

MS. GREEN: Cliff Bowman.

CLIFF BOWMAN,

a witness called by the People, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth testified on his oath as follows:

DIRECT EXAMINATION

BY MS. GREEN:

Q. Please state your full name and spell your last name.
A. Clifton Bowman, B-O-W-M-A-N.
[52] Q. Would you spell Clifton?
A. C-L-I-F-T-O-N.
Q. Sir, what is your occupation?
A. Dispatch.
Q. For the Sutter County Sheriffs' Department?
A. Sutter County Sheriff's Department.
Q. Were you working on November 27, 2001?
A. Yes.
Q. And do you recall a time when Deputy Brokenbrough called into dispatch and requested that you check on whether or not a particular person was a parolee at large?
A. Yes.
Q. That person being Bruce Edward Brendlin?
A. Yes.
Q. Okay.

MS. GREEN: Your Honor, I have a document that I'd like marked as People's 1.

(People's Exhibit 1 was marked for identification.)

BY MS. GREEN: Q. What do you do—what did you do in response to Deputy Brokenbrough's call, in response to whether or not there was a warrant?

A. Called the Department of Corrections.

Q. Did you speak with someone at the Department of Corrections:

A. Yes.

Q. What did they tell you?

A. That there was an active warrant.

Q. Do you recall what the warrant was for?

A. Parole violation.

[53] Q. Okay.

THE COURT: For what?

THE WITNESS: Parole violation.

BY MS. GREEN: Q. I'm showing you People's Exhibit 1 for identification.

I'm showing this to counsel first.

Mr. Warriner has already received a copy of it, Your Honor.

Q. People's Exhibit 1 for identification, would you take a look at that document and tell me if you recognize it?

A. Yes.

Q. What is it?

A. It's a copy of a warrant abstract.

Q. Okay. And when you say a warrant abstract, it's a teletype of information, with respect to CDC, of warrants?

A. Yes.

Q. CDC being California Department of Corrections?

A. Yes.

Q. And what—is this a document that you would be printing at the sheriffs' department?

A. Yes.

Q. Okay. And how do you obtain this information?

A. Via teletype from the Department of Corrections.

Q. Then you print it out while you're working as a dispatcher?

A. Yes.

Q. What does this document tell?

A. It lists the name, physical description and what the violation is.

Q. Okay. And does it indicate that there's a—was a warrant [54] for Bruce Edward Brendlin?

A. Yes.

Q. And it was a no bail warrant?

A. Yes.

Q. After you talked to the person at CDC, did you provide that information to Deputy Brokenbrough?

A. Yes.

Q. Okay. And after you print this document, where does it go?

A. To the jail.

Q. And that's when he's booked on the warrant?

A. Yes.

MS. GREEN: No further questions.

MR. WARRINER: No questions.

MR. HANSEN: No questions.

THE COURT: Thank you.

THE COURT: Is this witness excused or do you want him to remain?

MS. GREEN: We can just have him remain.

I'd call Larry Dunn.

LARRY DUNN,

a witness called by the People, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

THE COURT: For the record, unlike most witnesses in Sutter County, I happen to know this witness who was a probation officer in Butte County for a number of years. I have never socialized with him, but he's been there for a number of years before he took whatever job he now has. I did not recognize him in the [55] hallway.

DIRECT EXAMINATION

BY MS. GREEN:

Q. Please state your full name and spell your last name.

A. Larry Allen Dunn, D-U-N-N.

Q. What is your occupation?

A. State parole agent.

Q. And on November 27th, 2001, were you the parole agent for Bruce Edward Brendlin?

A. Yes.

Q. Are you familiar with him?

A. Yes.

Q. Do you see him in court today?

A. Yes.

Q. Would you point him out, describe what he's wearing and where he's sitting?

A. He's the gentleman that just waved at me that is sitting at the table right in front of me wearing the orange sweatshirt.

THE COURT: Let the record reflect he's been identified.

BY MS. GREEN: Q. I'm showing you People's Exhibit— Mr. Warriner has a copy of it. I'll show it to Mr. Hansen.

(Pause.)

BY MS. GREEN: Q. Showing you People's Exhibit 2 for identification, would you take a look at that document and tell me if you recognize it?

A. Yes, I do.

Q. What is it?

A. It's an at-large report that I authored and signed off on [56] November 19, 2001.

Q. What is an at-large report?

A. An at-large report is also referred to as a PAL report.

THE COURT: A what?

A. A P-A-L report, parolee at large. It's a report that I author as a result of an investigation, which is a statement by me that the parolee is avoiding supervision and that his or her whereabouts are unknown. It is also a formal request from me that the Board of Prison Terms suspend parole and issue an arrest warrant.

Q. Did you actually submit that to the Board of Prison Terms?

A. Yes, I did.

Q. When was that authored?

A. November 9, 2001.

Q. Okay. Showing you what's been marked as People's Exhibit 3 for identification, do you recognize what that documents is?

A. Yes, I do.

Q. What is it?

A. It's a Central office Calendar decision which reflects that the Board of Prison Terms received my report, ordered parole suspended and that a warrant was issued for Mr. Brendlin's arrest, with the last—his name and CDC number at the bottom.

Q. Was in fact a warrant issued for Mr. Bruce Brendlin for absconding?

A. Yes, ma'am.

Q. You're familiar that that warrant had been entered into the system prior to the time of November 27th, 2001?

A. Yes.

[57] Q. Okay. showing you People's Exhibit 1 for identification, do you recognize what that is?

A. It's an abstract of judgment—excuse me—abstract reflecting the PAL warrant for Mr. Brendlin.

Q. Okay. That's the information that CDC puts in its computer system for law enforcement, with respect to the parolee warrants?

A. Yes, ma'am; the CLETS system on the warrants.

Q. That specifically relates to Mr. Brendlin, correct?

A. Yes.

Q. Does that document tell you when the warrant was entered into the system?

A. Yes, it does.

Q. And when does it say it was entered into the system?

A. November 15, 2001.

MS. GREEN: The People would move items 1, 2 and 3 into evidence, Your Honor.

THE COURT: Any Objection?

MR. WARRINER: No Objection.

THE COURT: Received.

(People's Exhibits 1, 2 and 3 were received in evidence.)

MS. GREEN: No further questions.

THE COURT: Mr. Warriner.

CROSS-EXAMINATION

BY MR. WARRINER:

Q. In regard to Exhibit 3, it says his parole status was suspended as of 10/18/01?

A. Yes, sir.

Q. And so that would mean on November 27, 2001--was Mr. [58] Brendlin patrol status suspended at that time?

A. Yes, sir.

Q. And you're saying that a warrant was issued because of his at large status?

A. Yes, sir.

Q. When it says "suspended," it means that basically—basically a warrant goes out rather than him continuing to be on parole; is that right?

A. No, sir.

Q. No?

A. No.

Q. Does that mean that your supervision of him is suspended?

A. No, sir.

Q. Okay. But your actively looking for him in order to arrest him at that time?

A. Yes, sir; if I find him, I will arrest him.

Q. Okay. I see. Because there's a warrant in the system?

A. Yes, sir.

MR. WARRINER: Okay. No questions.

MR. HANSEN: No questions.

REDIRECT EXAMINATION

BY MS. GREEN:

Q. With respect to a parolee who is in that suspended status, are they still subject to the same search conditions?

A. Yes, ma'am.

MS. GREEN: No further questions.

MR. WARRINER: No questions.

THE COURT: Does parole suspended simply mean they don't [59] have the right to be out on parole?

THE WITNESS: It means that the clock has stopped. In probation the terms are a bit different; it would be "revoked." The terms of conditions remain in effect, but the clock is stopped in order to retain jurisdiction.

THE COURT: Okay.

MS. GREEN: No further questions.

MR. WARRINER: No further questions.

THE COURT: Thank you.

THE WITNESS: Yes, ma'am.

Ms. GREEN: No further witnesses.

MR. WARRINER: Defense would call Investigator Mark Regan.

MARK REGAN,

a witness called by the Defense, after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WARRINER:

Q. Mr. Regan, what is your role in regards to the Brendlin case?

A. I am a licensed provide gather retained by the Sutter County Public Defender's office to work on your behalf for the defendant.

Q. And what is your—as a private investigator, what is your prior experience for this job?

A. To become a licensed private investigator, you have to have 6,000 hours prior investigating experience to utilize. I was deputy sheriff with the county of Sutter for 11 years, full time; [60] prior to that, two years.

Q. Okay. And did you perform some tasks in this Brendlin case in regards to this temporary sticker?

A. Yes.

Q. What did you do?

A. I went to Geweke's tow yard at—gosh, I forget. I think it's 10th and S Street, in that area, where they have a storage facility, and photographed the vehicle.

Q. All right. And how did you know that you were photographing the right vehicle?

A. I compared it to the police report prepared by Officer—or Deputy Brokenbrough. The license plates matched the vehicle description and the police report matched.

Q. Okay.

A. And eventually the vehicle registration. And it matched all the information in the report and the CLP.

Q. Okay. I'm going to show you Defendant's Exhibits A and B; can you look at those?

A. Yes.

Q. Do you recognize those?

A. Yes, I do.

Q. What does Defense Exhibit A depict?

A. A is a photograph that I took of the vehicle—of the sticker on December 12th, while it was in the storage yard.

Q. Okay. And that's the so-called temporary sticker that's in the rear window of the vehicle?

A. It's a temporary operating permit.

Q. Okay. Temporary operating permit.

[61] I suspect when you took that picture in Exhibit A you were taking it through the glass in the vehicle. How did you take that picture?

A. Without comparing to the other photographs—I took 10 photographs. I took photographs of the sticker while it was still mounted in the vehicle, as it was when I came upon it, and then I took photographs when we moved it to the back of it, also.

Q. Exhibit B, what does that depict?

A. B is a photograph of the vehicle from which the defendants were arrested and is referenced to in the police report authored—written by Deputy Brokenbrough.

Q. Did you—the interior of the vehicle?

A. Very briefly.

Q. Okay. Did you ever find a receipt in the vehicle?

A. I found a DMV receipt, along with the registration.

Q. Where was that found?

A. I believe—I don't recall if it was in the glove box—I think—I believe, if I'm not mistaken, it was on the floorboard or the seat.

Q. And let me show you some photographs. I'm going to have these marked as Defendant's Exhibits C and D. I've shown these to Counsel.

(Defense Exhibits C and D were marked for identification.)

BY MR. WARRINER: Q. Okay. I'm showing you Defendant's C and D. Do you recognize those exhibits, the pictures?

A. Yes, I do.

Q. What is Exhibit C?

[62] A. C is a photograph of the receipt that was attached to the registration in the vehicle.

Q. All right. And what is Exhibit D?

A. D is—it's a report of deposit of fees for the vehicle and part of the registration and receipts.

Q. And who's the registered owner of the vehicle?

A. This indicates that the registered owner on this receipt is Gail Tonner, T-O-N-N-E-R.

Q. Now, the picture that you took of that receipt, did you confiscate the actual receipt or did you just take that picture?

A. I took photographs and left everything in the vehicle, which was locked.

Q. Let me see Defense A and B again. I'm going to show you Defense Exhibit A. Is there any way you can tell by looking at Defense Exhibit A, and then looking at Exhibits C

and D, whether that receipt corresponds to that temporary operating permit?

A. Yes.

Q. How can you tell?

A. The date stamped and numbers on the receipt and dates are—they correspond, as well as the receipt is stamped "through November," which is consistent with the 11 on the temporary operating permit. Additionally, although not clear in this photograph—they're designed to fade, these stickers—is the vehicle license plate and the month and date and other information that DMV puts on these. So they're seen and displayed in the window to match the registration and people paying fees.

Q. Okay. And on these Exhibits C and D, it looks likes [63] there's—is there handwriting on there?

A. That's correct.

Q. What does that state?

MS. GREEN: The item speaks for itself, Your Honor.

THE COURT: If I can read it in the picture.

MR. WARRINER: What does it appear—

THE COURT: I'm going to go over it.

THE WITNESS: I'm sorry.

THE COURT: Go ahead.

THE WITNESS: In the—it says at the top, "And through November," and the initials, VR.

MR. WARRINER: Okay.

THE WITNESS: Did you want to see those?

(Witness handing document to the Court.)

BY MR. WARRINER: Q. When you were with the special detectives—what years were you with the special detectives?

A. From 1977 through 1988.

Q. When you were with the sheriffs' department did you ever work patrol, where you would drive around in a patrol vehicle?

A. Yes.

Q. Did you ever make traffic stops?

A. Yes, I made quite a few.

Q. Have you ever seen, when you were a police officer, seen temporary operating permits such as that depicted in Exhibit A?

A. Yes, I have.

Q. And to what—from your law enforcement experience, what is the significance of that sticker?

A That's given to people at DMV while there are certain [64] deficiencies or things still due in their registration that are not contraindicative to their still operating the vehicle safely, so they don't get stopped by law enforcement.

Q. So if you were a law enforcement officer and you saw a sticker, 11, and it was the 11th month, November, would you feel authorized to stop the vehicle?

MS. GREEN: Objection; relevance.

THE COURT: Sustained.

MR. WARRINER: No other questions.

Actually, I want to move in my exhibits; I'd ask to move all those in.

THE COURT: A B C and D, received.

(Defense Exhibits A, B, C and D were received in evidence.)

Mr. Hansen, any questions?

MR. HANSEN: I have no questions, Your Honor.

THE COURT: All right. Ms. Green.

MS. GREEN: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. GREEN:

Q. Showing you People's Exhibit C—

MR. HANSEN: People's C?

MS. GREEN: Excuse me; Defense evidence C, actually, where did you find that?

A. You know, it was—I don't recall exactly. It was either in the glove box, on the floorboard or on the seat; I don't recall.

Q. Okay.

A. Of the vehicle.

[65] Q. Defense C indicates that a smog inspection slash certification is required. Do you know what that means?

A. That means they need to take it to a shop to certify that the vehicle is not in violation of the Air Pollution Act and so forth. So it needs a smog certificate.

Q. Were smog certificates required when you were a policeman?

A. I honestly—I don't remember. I think so.

Q. Do you own a car?

A. Yes, I do.

Q. Do you have to register your car with the DMV?

A. Yes, I do.

Q. Do you know, from your own experience, in order to register your car you have to show proof your car has been smogged, and you have insurance?

A. That's correct.

Q. Now, showing you Defendant's evidence A, there's an area on this that says "receipt number." Would you tell me what the receipt number is.

A. Could you show me where it says that? I need new glasses.

Q. This white type, it says, "receipt number, No.," with a line above it?

A. Yeah.

Q. Can you tell me what number is written on that line?

A. No, in this photograph, I can't.

Q. You can't read it?

A. Not in this photograph.

Q. Okay.

MS. GREEN: No further questions.

[66] THE COURT: Mr. Warriner.

MR. WARRINER: Yeah, just a minute.

REDIRECT EXAMINATION

BY MR. WARRINER:

Q. Okay. I'm going to show you Defense Exhibit A; it looks like there are two numbered photographs. Can you read paragraph number one?

A. My arm's not long enough. The department receipt—"the receipt number and receipt number shown on this permit must agree."

Q. All right?

A. "Or"—

Q. Just paragraph one.

A. Okay.

Q. And I'm going to show you Defendant's Exhibit D, and I want you to look at the bottom right-hand corner?

A. Okay.

Q. Is there a stamped number on that bottom right-hand corner?

A. There are stamped numbers, yes.

Q. And on Exhibit A—is there a stamped number on Exhibit A?

A. There are stamped numbers, yes.

Q. Is that the only stamped number on Exhibit A?

A. Correct.

Q. And does that stamp number on Exhibit A correspond to the stamp number on Exhibit D?

A. Yes, it does.

MR. WARRINER: okay, no further questions.

THE COURT: Mr. Hansen.

[67] MR. HANSEN: No questions.

MS. GREEN: No questions.

THE COURT: All right. Thank you. Next witness.

MR. WARRINER: No other witnesses.

THE COURT: Okay.

Counsel want to be heard?

MS. GREEN: Your Honor, I would still—the People's position is that Defendant Brendlin was not detained until the time he was ordered out of the car at gunpoint. At that point there was a warrant for his arrest. And I don't think the defense can make a showing that that arrest, not withstanding the warrant, was unreasonable; therefore I'd ask that the motion to be suppressed be suppressed on that grounds.

On secondary grounds, that you find the defendant is a passenger that has no standing with respect to any of the items that were located in the car or in Ms. Simeroth's waistband or in a cavity search that was conducted at the jail. So I'd ask that you deny it on that grounds.

And if the court doesn't deny it on either one of those grounds, the People would argue that the officer had probable cause to stop the vehicle, at a minimum to inspect whether or not there was a valid registration, number one, as a violation of Vehicle Code Section 4002, to determine whether or not there was a violation of I believe it's 524—I'm not sure; I cited it in my brief.

THE COURT: Not having the rights tabs?

MS. GREEN: Not having the right tabs on the car.

The issue isn't whether or not that car was lawfully [68] registered; the issue is whether or not the officer at the time that he stopped the vehicle had probable cause to believe that a crime may be committed, based on both the information provided to him prior to the stop, where he observed the vehicle at Circle K, and he was informed by dispatch that it had been expired, and with respect to the evidence that is in front of the Court.

Even if that temporary sticker does match that vehicle, it has to be supported by a letter of DMV, and the vehicle's number has to match; and there's no way an officer is going to know that until he stops, contacts the driver and is provided with that information.

MR. WARRINER: Okay. Actually, just to address the last point. It actually says it needs to be supported by the receipt number. It says: "The receipt number shown on the permit must match the receipt number or a letter issue used by DMV. We showed that the receipt numbers match and everything is paid.

THE COURT: I know. How would the officer see it if it was in the glove box or on the floorboard?

MR. WARRINER: The officer—Your Honor, the officer doesn't need to see it. When you have a sticker like this that says 11, the reason they put that on is so you don't go around and get stopped by officers, so you can drive in peace in this country and not be stopped by officers. That's why they put the big number on there.

So the officer was wrong in stopping this vehicle. That's what we assert. And I don't think the officer had any reason to come up there and investigate this number 11 sticker. He—the officer admitted on the stand that there was nothing about the [69] appearance of the sticker that made him think this

was one of these stolen or falsified stickers. There's nothing at all. He had absolutely no reason at all to do that.

He obstructed Mr. Brendlin. He detained Mr. Brendlin. Mr. Brendlin has standing. I cited the cases before, which are mentioned in the prosecutor's brief. Those cases say Mr. Brendlin, the passenger, does have standing to address the issue of a traffic stop.

In any event, Ms. Simeroth is joined in the case and she is the driver. And I don't think there's any assertion that she doesn't have standing; and I think in that sense, Mr. Brendlin can take a backseat to her standing. The court can't supress it against Ms. Simeroth but not to Mr. Brendlin—I don't think the Court can.

THE COURT: The Court can. You don't have standing.

MR. WARRINER: Well, I respectfully disagree with the Court.

THE COURT: If your right of privacy hasn't been invaded, you have no standing and can't supress anything.

MR. WARRINER: That's not—those cases say we do have standing.

THE COURT: Okay. Mr. Hansen.

MR. HANSEN: Well, I don't think there's any question of standing as to Ms. Simeroth.

THE COURT: We don't have to worry about that one.

MR. HANSEN: I think the whole point, just as Mr. Warriner has said, is, DMV is giving a big red sticker so they see a vehicle that appears have registration. That's wrong that that wasn't the case. Otherwise, why would they bother putting the [70] sticker on the car and why would people have to be stopped every time? I don't think that's the intent of the law and I think the officer knew that. He had no reason to stop.

THE COURT: Okay. Number one, this passenger was not detained until the warrant came back and a gun was pointed at him and he was under arrest. That's number one. He was free to leave. And if he had opened the door and got out and taken a hike, then this officer would have had to decide whether he had something less than probable cause to detain him, and then he would have been detained. But he wasn't detained because he never went anywhere; but he had a right to if he wanted to.

Number two, there is a valid stop. This permit is only valid when it is accompanied by a receipt or a letter and that the numbers match. And so I don't have any problem that the vehicle was stopped, especially when the officer had already radioed earlier in the evening and found out that the vehicle was, according to DMV, unregistered, which gave him all the probable cause in the world to wonder where this thing came from, because the car came back unregistered. And of course it was unregistered and it wasn't to be registered until it had its smog.

Next, a passenger does not have standing to supress the items in the vehicle, separate and apart from whether there's probable cause to arrest him or to detain him. So he's put on no standing that he has any interest in any of the items that he seeks to supress, separate and apart from his allegations that he was detained.

I think that's it.

[71] MR. WARRINER: Judge, just—you know, I questioned the officer about the details of his stop and putting on his red lights and the bright light and everything, just to demonstrate to the Court we believe there was a detention.

THE COURT: I know you think there was a detention.

MR. WARRINER: And I think you have to look at it from a reasonable person, what a reasonable person feels, that they're free to go when it's 1:30 in the morning? There's an

armed officer approaching the vehicle with red lights and his vehicle parked behind you. I wouldn't get out of the vehicle and walk away.

THE COURT: He felt secure enough to open the door and close it.

MR. WARRINER: So?

THE COURT: He didn't say, "Officer, may I take a hike."

MS. GREEN: Your Honor, with respect to the motion to continue, I would ask that that trail until Monday afternoon. We have a trial readiness conference, and we may be able to enter some stipulations.

THE COURT: Do you want me to continue the motion to Monday afternoon?

MS. GREEN: Yes.

THE COURT: All right. That would be February 11th at 1:30?

MS. GREEN: Yes, we already have a hearing set that day already.

THE COURT: Thank you. Otherwise, the trial—we're confirming the trial?

MS. GREEN: Correct.

[72] THE COURT: Thank you.

(Proceedings ended.)

* * * *

[73] MONDAY, FEBRUARY 11, 2002

* * * *

The matter of the People of the State of California versus Karen Sue Simeroth and Bruce Edward Brendlin, Defendants, Case Number CRF-01-2703, came on regularly before the Honorable Chris Chandler, Judge of the Superior and Municipal Court, for the County of Sutter, State of California, sitting in Department Three.

The People were represented by Susan Green, Deputy District Attorney.

The Defendant, Karen Sue Simeroth, was present and represented by Norman P. Hansen, Esq., Conflict Counsel, acting as her attorney.

The Defendant, Bruce Edward Brendlin, was personally present and represented by Timothy Warriner, Deputy Public Defender, acting as his counsel.

The following proceedings were then had:

* * * *

THE COURT: People versus Karen Sue Simeroth and Bruce Edward Brendlin, CRF-01-2703.

Counsel, may we have your appearances for the record?

MS. GREEN: Susan Green for the People.

MR. HANSEN: Norman Hansen with Ms. Simeroth.

MR. WARRINER: Tim Warriner with Mr. Brendlin.

THE COURT: Ms. Green, this matter is on for trial readiness conference. What are you anticipating happening this afternoon?

MS. GREEN: I believe that Mr. Brendlin will be [74] pleading guilty to Count One, your Honor. We will need to amend the second prior drug conviction to make it a prison

prior. He would then be receiving the lower term on Count One for three years plus one year for the prison prior for a total of four. Ms. Simeroth would also be pleading to Count One with a promise of probation. I'd like to take Mr. Brendlin's plea first, your Honor.

THE COURT: And, Mr. Warriner, is that what you're anticipating happening this afternoon?

MR. WARRINER: Yes, it is. As to the prison prior, I guess what we're contemplating is the March 24, 1989 transportation.

MS. GREEN: Oh, actually we should do the August 4, 1995, because that's what he's on parole for.

MR. WARRINER: Okay.

MS. GREEN: Manufacturing on August 4, which would be the second one.

THE COURT: Let's just get the details here, and then we'll amend.

Is that what you are agreeing to, Mr. Warriner?

MR. WARRINER: Yes, it is.

THE COURT: And, Mr. Brendlin, you're in agreement?

THE DEFENDANT BRENDLIN: Yes, sir.

THE COURT: And, Mr. Hansen?

MR. HANSEN: Yes, your Honor.

THE COURT: From what's been said, that's what you're anticipating this afternoon?

MR. HANSEN: Yes.

[75] THE COURT: And, Ms. Simeroth, that's what you are prepared to do this afternoon?

THE DEFENDANT SIMEROTH: Yes, sir.

THE COURT: And then Ms. Green has a motion to amend the Information.

Ms. Green, specifically page and line?

MS. GREEN: Page two, go down to line 21, starting with Health and Safety Code, we would then be striking the remainder of that line and line 22 and inserting "and he served a separate term in prison for that conviction and had not remained free of both prison custody and the commission of a new felony offense for a period of five years."

MS. WARRINER: I think that's fine. I think we should cite, though, 667—

MS. GREEN: Penal Code Section 667.5(b).

THE COURT: The district attorney's motion is not opposed, Mr. Warriner. The Court is putting a period after Health and Safety Code at line 21, crossing out the remainder of the original paragraph, has inserted "and he served a separate term in prison for that conviction and did not remain free of both prison custody and the commission of a new felony offense in five years." Up at the top line 15, strike Health and Safety Code Section 11370.2. Prior prison term is inserted, 667.5(b).

Ms. Green, would that cover it?

MS. GREEN: Yes, your Honor.

THE COURT: And, Mr. Warriner, without objection, those amendments have been made on page two for the prior [76] conviction?

And, Mr. Brendlin, you have heard what the attorneys have said. Is that what you are prepared to do this afternoon?

THE DEFENDANT BRENDLIN: Yes.

THE COURT: Mr. Warriner, have you had the opportunity to talk with the charges pending against him and the alleged

prison prior, the possible defenses he might have as to those charges, his Constitutional Rights, and the consequences of his plea, and the admission he's about to make?

MR. WARRINER: Yes.

THE COURT: And you're satisfied that he understands these things?

MR. WARRINER: Yes.

THE COURT: Thank you.

And, Ms. Green, would you please state the factual basis for the plea and the admission if you feel a factual basis for the admission is necessary.

MS. GREEN: On November 27th, 2001, in Sutter County the defendant was in possession of a bilayered solution which contained methamphetamine. Methamphetamine reaction by-products were indicated, and an expert would testify that that solution was in the process of manufacturing methamphetamine. He knew of both its presence and its nature in participating in the manufacturing of that methamphetamine. He had been convicted in—on August 4th, 1995, of manufacturing, a violation of section 11379.6 of [77] the Health and Safety Code and was on parole for that offense when he committed this new offense, your Honor.

MR. WARRINER: So stipulate.

THE COURT: Mr. Brendlin, the district attorney is now going to outline for you the consequences of your plea and your admission. If you understand the question she puts to you, please answer out loud with a yes or no. If you have any questions, please confer with your attorney before answering out loud.

Ms. Green.

MS. GREEN: Sir, do you understand in a few minutes the judge is going to sentence you to four years in State Prison?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: You will be released before the end of your term on parole and parole can last for a period of three years.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: If you violate the terms of parole, you can be sent back to State Prison for each violation.

Do you understand this?

THE DEFENDANT BRENDLIN: Uh-hum.

MS. GREEN: I need yes or no for the court reporter.

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: Because you're going to prison in this case, it's what's known as a prison prior. If you commit another future felony, it can add one year to the sentence [78] of any future felony.

Do you understand that?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: This is what's called a commerical drug offense. In the future if you commit another commercial drug offense, it can add three years to the future prison sentence.

Do you understand that?

THE DEFENDANT BRENDLIN: Yes, I do.

MS. GREEN: If it's charged against you.

You are also not eligible for probation.

Do you understand that?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: Because you have at least two felony convictions, if you commit another felony, regardless of the type of offense, you are presumed ineligible for probation.

Do you understand that?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: If you are on probation or parole in any other matter, a plea in this matter could constitute a violation of that probation or parole.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: You can be sentenced to the maximum term on that probation or parole. Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: If you are not a citizen of the United States, a plea in this case will be used to deport you from [79] this country. Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: If you are not a citizen of the United States, a plea in this case could be used to deny you citizenship should you apply.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes, I do.

MS. GREEN: And should you leave the United States if not a citizen, a plea in this case would deny you re-entry into this country.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: Because you are pleading to a felony, it would be illegal for you to own or have in your custody or control firearms or ammunition.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: That's a felony punishable by up to three years in State Prison.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: Because this is a drug offense, you will be required to register as a drug offender pursuant to Section 11590. Failure to do so is a misdemeanor offense.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: You will be ordered to pay a restitution fine of $200 up to $10,000.

[80] Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: If anyone is out any money due to your actions in this case for like toxic cleanup and such, you could be ordered to pay restitution to them.

Do you understand this?

THE DEFENDANT BRENDLIN: Yes.

MS. GREEN: Your Honor, I believe that covers the consequences.

THE COURT: Thank you, Ms. Green.

Mr. Brendlin, you are entitled to have a jury trial in this case. At a jury trial you couldn't be found guilty of anything unless all twelve jurors were convinced of your guilt beyond a reasonable doubt.

Do you understand that right?

THE DEFENDANT BRENDLIN: Yes.

THE COURT: Do you give up that right?

THE DEFENDANT BRENDLIN: Yes, I do.

THE COURT: If at your jury trial, you are entitled to confront your accusers from the witness stand and cross-examine those accusers through your attorney.

Do you understand those things?

THE DEFENDANT BRENDLIN: Yes, I do.

THE COURT: Do you give up that right?

THE DEFENDANT BRENDLIN: I do.

THE COURT: You are also entitled to present your own defense. You can subpoena your own witnesses and evidence into Court for your defense at no cost to you.

[81] Do you understand your right to present a defense?

THE DEFENDANT BRENDLIN: Yes.

THE COURT: Do you give up that right?

THE DEFENDANT BRENDLIN: Yes, sir.

THE COURT: You have right the to remain silent. At a trial no one could call you as a witness without your consent. Today no one can compel you to plead guilty or give up your right to remain silent.

Do you understand that right?

THE DEFENDANT BRENDLIN: Yes, your Honor.

THE COURT: Do you give up that right?

THE DEFENDANT BRENDLIN: Yes.

THE COURT: Mr. Warriner, join in those waivers?

MR. WARRINER: Yes.

THE COURT: Mr. Brendlin, has anyone threatened you to make this plea and admission?

THE DEFENDANT BRENDLIN: No, sir.

THE COURT: Has anyone promised you anything that hasn't been said in open court since I called your case just a few minutes ago to make you make this plea and admission?

THE DEFENDANT BRENDLIN: No, sir.

THE COURT: Within the last 24 hours have you consumed any alcohol, medication, or drugs?

THE DEFENDANT BRENDLIN: No, sir.

THE COURT: Mr. Brendlin, you are entitled to apply for probation in this case.

Do you understand that right?

THE DEFENDANT BRENDLIN: Yes, sir.

[82] THE COURT: Do you give up that right?

THE DEFENDANT BRENDLIN: Yes, sir.

THE COURT: You are entitled to a written probation report. Do you understand that right?

THE DEFENDANT BRENDLIN: Yes

THE COURT: Do you give up that right?

THE DEFENDANT BRENDLIN: Yes.

THE COURT: Mr. Warriner, this will be a plea of guilty?

MR. WARRINER: Ah, yes.

THE COURT: And, Mr. Brendlin, do you have any questions to ask before I ask you how you plead and if you admit the prison prior?

THE DEFENDANT BRENDLIN: No, your Honor.

THE COURT: Mr. Warriner, do you waive full reading of Count One and the alleged prior pursuant to 667.5?

MR. WARRINER: Yes.

THE COURT: Mr. Brendlin, it is alleged in Count One that on or about November 27th, 2001, you committed a felony

violation of 11379.6(a) of the Health and Safety Code, commonly called manufacturing methamphetamine.

Sir, to that charge how do you plead?

THE DEFENDANT BRENDLIN: Guilty.

THE COURT: Sir, it's alleged that you suffered a prior prison conviction, specifically for 11379.6 of the Health and Safety Code, served time in prison for that conviction, and did not remain free of both prison custody and the commission of a new felony offense for five years.

[83] Sir, do you admit the truth of that allegation?

THE DEFENDANT BRENDLIN: Yes, I do.

THE COURT: Mr. Brendlin, I find that there is a factual basis for your plea and your admission. I find that both of those were made and the waivers of your rights were made knowingly, intelligently, and voluntarily. I accept the plea and admission. I find you to be in violation or guilty rather of 11379.6, and I find that you suffered a prior prison conviction as alleged.

Mr. Warriner, do you waive time for sentencing?

THE DEFENDANT BRENDLIN: Yes, sir.

THE COURT: Do you waive arraignment for sentencing?

MR. WARRINER: Yes.

THE COURT: Is there any legal cause why we shouldn't proceed with pronouncement of judgment and sentencing?

MR. WARRINER: No.

THE COURT: Bruce Edward Brendlin, pursuant to the stipulation, for 11379.6(a) of the Health and Safety Code, your [sic] are sentenced to the lower term of three years in the State's Prison. You will receive pre-sentence custody credits of how long?

MR. WARRINER: 77 plus 38 for 115.

MS. GREEN: That's right.

THE COURT: Mr. Brendlin, do you agree?

THE DEFENDANT BRENDLIN: Yes; I do.

THE COURT: You will receive pre-sentence custody credits of 115 days which is 77 actual time in custody plus 38 days good time/work time.

[84] And for a separate consecutive punishment and sentence for violation of a prior prison—a prior felony for which you did not remain free of custody and served a separate term and having not been free of both prison custody and commission of the new felony for five years, pursuant to 667.5(b) of the Penal Code, Mr. Brendlin is ordered to serve an additional one year.

Mr. Brendlin is ordered to serve—excuse me. To pay the minimum restitution fine of $200 pursuant to 1202.4 of the Penal Code. The Department of Corrections is ordered to withhold that from his prison account pursuant to 2085.5 of the Penal Code. Mr. Brendlin is ordered to pay a $200 restitution fine of $200 pursuant to 1202.45, which is ordered stayed pending his successful completion of his parole. On the motion of the district attorney, all other counts as to Mr. Brendlin are dismissed in the Information.

Mr. Brendlin is advised that he has the right to file a notice of appeal within 60 calendar days of today's date. That must be in writing and it must be filed personally since the Public Defender's Office won't represent him after today. And, finally, the Court of Appeal would appoint an attorney to represent him on appeal.

Now, there is a note here that Mr. Brendlin had a parole hold.

Does any reference need to be made as to that?

MR. WARRINER: I'm requesting.—I believe our discussions earlier in chambers was this would run concurrent to any parole violations. I would ask the Court [85] include that language.

THE COURT: Ms. Green, any—any discussion on that point.

MS. GREEN: No, your Honor. That's fine.

THE COURT: All right. The sentence just imposed will run concurrent with any violation of parole.

Anything further from the People?

MS. GREEN: No.

THE COURT: Anything further from the defense?

MR. WARRINER: No.

THE COURT: That's it for Mr. Brendlin.

* * * *

CERTIFICATE OF GENERAL SHORTHAND REPORTER

State of California)
) ss.
County of Sutter)

I, Lori Beck, hereby certify that I am a General Shorthand Reporter and that at the times and places shown, I recorded verbatim in stenographic writing the proceedings had in the following described action completely and correctly to the best of my ability:

Court: SUTTER COUNTY SUPERIOR COURT

Judge: HONORABLE H. TED HANSEN, COURT-ROOM 2

Case Name: THE PEOPLE OF THE STATE OF CALIFORNIA
-vs-
BRUCE EDWARD BRENDLIN, Defendant

Case Number: CRF-01-2703

Proceedings: Arraignment

Date: Monday, December 31, 2001

Pages: 1 through 3

I further certify that my said stenographic notes have been transcribed into typewriting and that the pages listed above constitute an accurate and complete transcript of all of my said stenographic writing for the dates and matters specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Dated: March 22, 2002

/s/ Lori Beck
LORI BECK, CSR
Certified Shorthand Reporter
License No. 6565

CERTIFICATE OF GENERAL SHORTHAND REPORTER

State of California)
) ss.
County of Sutter)

I Laura M. Blum, hereby certify that I am a General Shorthand Reporter and that at the times and places shown, I recorded verbatim in stenographic writing the proceedings. had in the following described action completely and correctly to the best of my ability:

Court:	Sutter County Superior Court
Case Name:	People v Bruce Edward Brendlin
Case Number:	CRF-01-2703
Date:	January 14, 2001
Action:	Felony Pretrial Conference Judge: Chris Chandler
Page:	4
Date:	February 11, 2002
Action:	Trial Readiness Conference/Entry of Guilty Plea
Pages:	73 through 85

I further certify that my said stenographic notes have been transcribed into typewriting and that the pages listed above constitute and accurate and complete transcript of all of my said stenographic writing for the dates and matters specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Dated: April 1, 2002

/s/ Laura M. Blum
LAURA M. BLUM
Certified Shorthand Reporter
CSR License No. 6093

CERTIFICATE OF GENERAL SHORTHAND REPORTER

State of California)
) ss.
County of Sutter)

I, Kimberly E. Durso, hereby certify that I am a General Shorthand Reporter and that at the times and places shown, I recorded verbatim in stenographic writing the proceedings had in the following described action completely and correctly to the best of my ability:

Court.: SUTTER COUNTY SUPERIOR COURT.

Judges: HONORABLE H. TED HANSEN, COURTROOM 2
HONORABLE CHRIS CHANDLER, COURTROOM 3
HONORABLE ANN RUTHERFORD, COURTROOM 2

Case Name: THE PEOPLE OF THE STATE OF CALIFORNIA
-vs-
BRUCE EDWARD BRENDLIN, Defendant

Case Number: CRF-01-2703

Action: 1538.5 Motion

Dates: FRIDAY, FEBRUARY 8, 2002 pages 5-72

I further certify that my said stenographic notes have been transcribed into typewriting and that the pages listed above constitute an accurate and complete transcript of all of my said stenographic writing for the dates and matters specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Dated: April 2, 2002. /s/ Kimberly E. Urso
KIMBERLY E. URSO,
CSR No. 11372

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sutter)

[Filed 1/27/04]

C040754
(Super. Ct. No. CRF012703)

THE PEOPLE,
Plaintiff and Respondent,

v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Sutter County, Chris Chandler, J. Reversed.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Bruce Edward Brendlin was the passenger in a car stopped by an officer who had a hunch that the temporary operating permit displayed in the window might not belong to the car and, thus, it was being unlawfully operated as an unregistered vehicle. As a result of the vehicle stop, the officer discovered that a warrant had been issued for defendant's arrest. Searches of defendant and the car revealed evidence of drug offenses.

Following the denial of his motion to suppress evidence (Pen. Code, § 1538.5), defendant entered a negotiated plea of guilty to manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and admitted having served a prior prison term (Pen. Code, § 667.5, subd. (b)). He was sentenced to a term of four years in state prison.

On appeal, defendant claims the trial court erred in denying his suppression motion. We agree. In reaching this conclusion, we reject the holdings in three Court of Appeal opinions which have concluded that a passenger in another person's car cannot contest the validity of a traffic stop of the vehicle. As we will explain, we agree with the majority view that a passenger can challenge the vehicle stop. We further conclude that the stop in this case was unlawful since the facts and inferences therefrom were insufficient to support a reasonable suspicion that the temporary permit was not for that car. Hence, the evidence seized from defendant and the car should have been suppressed because it was the product of the unlawful stop. Accordingly, we shall reverse the judgment.

FACTS

At approximately 1:30 a.m. on November 27, 2001, Deputy Sheriff Robert Brokenbrough saw that a Buick parked in a Circle K market had an expired registration tag. Brokenbrough "ran the plates and they came back expired." Dispatch told him that the expiration date was September 27, 2001, but that an application was "in process" for renewal of the registration.

Brokenbrough later saw the Buick being driven on Franklin Road. This time he noticed that, in the back window of the car, there was a red Department of Motor Vehicles temporary operating permit with the number "11," representing the month of November. The temporary permit was good until the last day of November 2001.

Based upon his 11 years of experience as a peace officer, Brokenbrough knew that drivers occasionally "remove [such temporary permits] and switch them around on vehicles" in order to avoid fines for expired registrations. Even though there was nothing unusual about the temporary permit on the Buick, e.g., the way it was affixed, to make him believe that it did not belong on the Buick, Brokenbrough "[m]ade a traffic stop" to "verify whether or not that sticker belonged to that vehicle."

Brokenbrough asked both the driver, Karen Simeroth, and the passenger, defendant, to identify themselves. Simeroth handed Brokenbrough her driver's license. Defendant said his name was Bruce Brown; however, from prior contacts, the officer recognized him as being one of the Brendlin brothers, either Scott or Bruce.

Believing that one of the Brendlin brothers was "a parolee at large," Brokenbrough "put Bruce Brendlin's name over the radio." Another officer responded, stating he thought the suspect was "absconding" on parole. When dispatch "confirmed that [defendant] was a parolee at large," he "was taken into custody at gunpoint."[1] A syringe cap was seized from defendant during a search incident to his arrest. A pat down search of Simeroth revealed that she was possessing two syringes, one without a cap, and a bag containing a green leafy substance. She was placed under arrest.

During a search of the Buick, officers seized various items apparently related to the manufacturing of methamphetamine.

DISCUSSION

In denying defendant's motion to suppress evidence, the trial court found that (1) as just a passenger in the Buick,

---

[1] Evidence established that, at the request of his parole agent, defendant's parole had been suspended and a no bail warrant had been issued for his arrest.

defendant was not detained until he was arrested when Deputy Sheriff Brokenbrough confirmed that he was a parolee at large, (2) the vehicle stop was lawful because the officer had sufficient cause to believe the car was unregistered, and (3) since defendant was merely a passenger in the Buick, he lacked "standing" to seek suppression of the items seized during a search of the car.

In reviewing a ruling on a motion to suppress, we "defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal. 4th 354, 362.) "Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution." (*People v. Banks* (1993) 6 Cal. 4th 926, 934.)

Asserting he was detained when Deputy Sheriff Brokenbrough stopped the Buick, defendant claims that the detention which led to the seizure of evidence was unlawful because the facts known to the officer did not give rise to a reasonable suspicion of criminal activity. In defendant's view, he had a reasonable expectation of privacy in the car and, therefore, he had "standing" to challenge its search.

The People retort that defendant "lacks standing to complain about the items seized from the vehicle," and "as to evidence seized from his person, he was not detained until ordered from the car . . . [a]t [a] point [when] the officer had probable cause to detain [him]."

For reasons to follow, we conclude (1) defendant can challenge the stop of the Buick, (2) the stop was unlawful because the facts and inferences therefrom were insufficient to support a reasonable suspicion that the temporary permit was not for the Buick, and (3) the evidence seized from

defendant and the Buick should have been suppressed because it was the product of the unlawful stop.

Long ago, the United States Supreme Court emphasized that "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' [Citations.] A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. [Citation.] And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment [citation], it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. [Citation.]" (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134, fn. omitted [58 L.Ed.2d 387, 394-395].) Pointing out the "substantial social cost" of applying the exclusionary rule to keep relevant and reliable evidence from the trier of fact, and to deflect "the search for truth at trial," the Supreme Court noted the importance of limiting the class of persons who may invoke the rule. (*Id.* at pp. 137, 138 [58 L.Ed.2d at p. 397].)

Courts used to refer to this question as "standing" to raise a Fourth Amendment violation. However, since *Rakas v. Illinois, supra*, 439 U.S. 128 [58 L.Ed.2d 387]), "the United States Supreme Court has largely abandoned use of the word 'standing' in its Fourth Amendment analyses." (*People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3.) "[T]he better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." (*Rakas v. Illinois, supra*, 439 U.S. at p. 139 [58 L.Ed.2d at p. 398].)

Thus, the issue is whether the defendant "is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." (*Rakas v. Illinois,*

supra, 439 U.S. at p. 139 [58 L.Ed.2d at p. 398].) Stated another way, "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." (*Id.* at p. 140 [58 L.Ed.2d at p. 399].)

There is a split of authority as to whether a passenger can challenge the legality of a traffic stop of the car.

One line of cases holds that a traffic stop constitutes a detention, or seizure, of not only the driver, but of passengers as well. (E.g., *People v. Bell* (1996) 43 Cal.App.4th 754, 765; *People v. Grant* (1990) 217 Cal.App.3d 1451, 1460; *U.S. v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *U.S. v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5; *U.S. v. Eylicio-Montoya* (10th Cir. 1995) 70 F.3d 1158, 1164; *U.S. v. Roberson* (5th Cir. 1993) 6 F.3d 1088, 1091.) The rationale of this majority view (see *People v. Bell, supra*, 43 Cal.App.4th at pp. 761-765) is that everyone in the vehicle is detained because the traffic stop "'significantly curtails the "freedom of action" of the driver and the passengers . . . .'" (*Id.* at p. 761, quoting *Berkemer v. McCarty* (1984) 468 U.S. 420, 436 [82 L.Ed.2d 317, 332]; see also *People v. Grant, supra*, 217 Cal.App.3d at p. 1458 [a passenger's "personal liberty and freedom of travel are intruded upon by" the stop]); *U.S. v. Twilley, supra*, 222 F.3d at p. 1095 [a "passenger's interests are affected when [the] vehicle is stopped"]; *U.S. v. Kimball, supra*, 25 F.3d at p. 5 ["a stop affects an occupant's interest in freedom from random, unauthorized, investigatory seizures"].)

Other decisions hold that a routine traffic stop does not subject a passenger to a seizure within the meaning of the Fourth Amendment. (E.g., *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373-1374; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1367-1369; *People v. Fisher* (1995) 38

Cal.App.4th 338, 343-344.) The rationale of this minority view is that the traffic stop is intended to restrain the freedom of movement of only the driver; the passenger, whose presence in the car "is merely fortuitous," does not submit to the show of authority and, without more, is free to leave after the vehicle stops. (*People v. Cartwright, supra*, 72 Cal. App.4th at pp. 1367-1368; see also *People v. Castellon, supra*, 76 Cal.App.4th at p. 1374; *People v. Fisher, supra*, 38 Cal.App.4th at pp. 343-344.)

In our view, a common sense application of Fourth Amendment principles leads to the conclusion that a traffic stop constitutes at least a momentary seizure of everyone in the car. Certainly, it must be said that the freedom of action of the passenger, as well as the driver, is significantly curtailed by an officer's act of making the driver stop the car. (See *California v. Hodari D.* (1991) 499 U.S. 621, 625-626 [113 L.Ed.2d 690, 697] [a "seizure" within the meaning of the Fourth Amendment occurs when a person yields to an officer's use of physical force, or show of authority, and the person's liberty is actually restrained in some way].) Whether a passenger remains detained thereafter depends on whether, under the circumstances, a reasonable person would feel free to leave while the officer deals with the driver. (*United States v. Drayton* (2002) 536 U.S. ___, ___ [153 L.Ed.2d 242, 251].) But the fact remains that, at the time of the initial traffic stop, the passenger is seized within the meaning of the Fourth Amendment. (See *California v. Hodari D., supra*, 499 U.S. at pp. 625-626 [113 L.Ed.2d at p. 697].) By no stretch of the imagination can it be said that the passenger is free to go from the point at which the driver yields to the officer's show of authority and the time that the seizure occurs when the car actually stops.

Consequently, although a passenger who asserts no property or possessory interest in the car "would not normally have a legitimate expectation of privacy" in the vehicle in

order to contest its seizure and search (*Rakas v. Illinois, supra*, 439 U.S. at pp. 148-149 [58 L.Ed.2d at p. 404]), the passenger can challenge the legality of the traffic stop because the passenger is asserting his or her own legal right to be free from an unlawful seizure. (See *Berkemer v. McCarty, supra*, 468 U.S. at p. 436 [82 L.Ed.2d at p. 332]; *Colorado v. Bannister* (1980) 449 U.S. 1, 4, fn. 3 [66 L.Ed.2d 1, 4]; *Delaware v. Prouse* (1979) 440 U.S. 648, 653 [59 L.Ed.2d 660, 667].)

So it is in this case. As a passenger in the car stopped by Deputy Sheriff Brokenbrough, defendant can challenge the legality of the stop.

According to defendant, the stop was unlawful because "there were no facts to support [a reasonable] suspicion the Vehicle Code was being violated." We agree.

"An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." (*United States v. Cortez* (1981) 449 U.S. 411, 417, fn. omitted [66 L.Ed.2d 621, 628]; *People v. Souza* (1994) 9 Cal.4th 224, 231.) In other words, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, [objectively] warrant [a reasonable suspicion that the suspect is, or is about to be, engaged in a crime]." (*Terry v. Ohio* (1968) 392 U.S. 1, 21 [20 L.Ed.2d 889, 906].) Such facts may include a "consideration of the modes or patterns of operation of certain kinds of lawbreakers." (*United States v. Cortez, supra*, 449 U.S. at p. 418 [66 L.Ed.2d at p. 629].) "The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*People v. Loewen* (1983) 35 Cal.3d 117, 123.)

Here, the only basis for the traffic stop was Deputy Sheriff Brokenbrough's belief that the Buick's driver might be operating the car in violation of Vehicle Code section 4000, which provides in pertinent part that no person shall drive upon a highway, including a public street, any motor vehicle "unless it is registered and the appropriate fees have been paid . . . ." But the facts known to the officer did not warrant a reasonable suspicion of such criminal activity. Before stopping the vehicle on November 27, Brokenbrough ran a check on the registration and was informed that it had expired but that an application was in process to renew the registration. Also before stopping the vehicle, he observed that a temporary operating permit with the number 11, representing the month of November, was in the back window. Although the temporary permit was good until the end of November and authorized defendant to drive the Buick on a public street (Veh. Code, § 4606), Brokenbrough knew from past law enforcement experience that some drivers "remove [temporary permits] and switch them around on vehicles" in order to avoid fines for expired registrations. However, he did not see anything unusual about the way the temporary permit was affixed to the Buick which would lead to the conclusion that it did not belong on the car. Indeed, he knew a registration renewal was in process for the Buick, which indicated the temporary permit was issued for it. Nevertheless, Brokenbrough stopped the Buick to verify whether the temporary permit was issued for that vehicle.

Because Deputy Sheriff Brokenbrough had at most a hunch that the driver of the Buick was operating an unregistered vehicle in violation of Vehicle Code section 4000, he acted unreasonably and unlawfully in stopping the vehicle for the purpose of determining whether the temporary operating permit belonged to the Buick. (Cf. *People v. Butler* (1988) 202 Cal.App.3d 602, 606-607 [an officer may not stop a vehicle simply for the purpose of determining whether its windows "were made of illegally tinted, rather than legally

tinted, safety glass"; unless the officer is aware of articulable facts that suggest the tinting is illegal, "the detention rests upon the type of speculation which may not properly support an investigative stop"].)

But for the unlawful vehicle stop, Deputy Sheriff Brokenbrough would not have discovered and seized the evidence against defendant. Consequently, the trial court erred in not suppressing the evidence "under the 'fruit of the poisonous tree' doctrine." (*U.S. v. Kimball, supra*, 25 F.3d at p. 6, citing *Wong Sun v. United States* (1963) 371 U.S. 471, 484-485 [9 L.Ed.2d 441, 453-454]; *People v. Butler, supra*, 202 Cal.App.3d at p. 607.)

DISPOSITION

The judgment is reversed.

SCOTLAND, P.J.

We concur:

BLEASE, J.

ROBIE, J.

IN THE SUPREME COURT OF CALIFORNIA
Court of Appeal
Third Appellate District

[Filed APR 14, 2004]

No. C040754, S123133
En Banc

THE PEOPLE,
Plaintiff and Respondent,

v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

Petition for review GRANTED.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Brown
Associate Justice

Moreno
Associate Justice

IN THE SUPREME COURT OF CALIFORNIA
Court of Appeal
Third Appellate District

[Filed MAY 12, 2004]

No. C040754, S123133
En Banc

THE PEOPLE,
Plaintiff and Respondent,

v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

The issues to be briefed and argued in this case are the following: (1) Was defendant, as a passenger in a vehicle subjected to a traffic stop, thereby "detained" for purposes of the Fourth Amendment, thus allowing him to contest the legality of the stop? (2) Could the vehicle be stopped on reasonable suspicion that it was being operated while unregistered, in violation of the Vehicle Code, when it exhibited an expired license plate registration tag, but also displayed what appeared from a distance to be a current temporary registration permit?

GEORGE
Chief Justice

IN THE SUPREME COURT OF CALIFORNIA

[Filed 6/29/06]

S123133

Ct.App. 3 C040754

Sacramento County
Super. Ct. No. CRF012703

THE PEOPLE,
Plaintiff and Respondent,

v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

When a peace officer directs the driver of a vehicle to pull over for a traffic stop but, in effecting the stop, gives no indication that the passenger of the vehicle is the focus of the officer's investigation or show of authority, is the passenger subjected to a "seizure" within the meaning of the Fourth Amendment? This is a question that has divided courts inside and outside this state. We find that the passenger, whose progress is momentarily stopped as a practical matter, is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority. We therefore reverse the judgment of the Court of Appeal, which (1) held that the passenger was automatically seized as a result of the traffic stop, (2) determined that the traffic stop was unlawful, and (3) suppressed the evidence of methamphetamine manufacturing found in the car and on defendant's person as the fruit of the illegal seizure.

BACKGROUND

Around 1:40 a.m. on November 27, 2001, Sutter County Sheriff's Deputy Robert Charles Brokenbrough effected a traffic stop of a brown 1993 Buick Regal with expired registration tabs on Franklin Avenue in Yuba City. Prior to the stop, Deputy Brokenbrough confirmed through dispatch that the car's registration had expired two months earlier but that an application was "in process" to renew the registration. Although Deputy Brokenbrough observed that a temporary operating permit with the number "11" (indicating an expiration date at the end of November) had been taped to the rear window, he could not determine from his vantage point whether the permit matched the vehicle and decided to stop the Buick to investigate further.

Deputy Brokenbrough approached the driver's side of the Buick and asked the driver, Karen Simeroth, for her driver's license. He also asked defendant, the passenger, to identify himself, since he recognized defendant as one of the Brendlin brothers, Scott or Bruce, and recalled that one of them had absconded from parole supervision. During the inquiry, Deputy Brokenbrough observed receptacles in the car containing substances used in the production of methamphetamine. In response to the deputy's inquiry, defendant falsely identified himself as Bruce Brown. The deputy returned to his patrol vehicle and verified that Bruce Brendlin was a parolee at large and had an outstanding no-bail warrant for his arrest. During this period, defendant opened and then closed the passenger door of the Buick.

After requesting backup, Deputy Brokenbrough pointed his weapon at defendant, ordered him out of the car, and placed him under arrest for the parole violation. The entire episode, from the time Deputy Brokenbrough asked Simeroth for her driver's license to his discovery that defendant had an outstanding warrant, lasted a couple of minutes.

Police found an orange syringe cap on defendant's person during a search incident to arrest. They found two hypodermic needles (one of which was missing a syringe cap), two baggies containing a total of 12.43 grams of marijuana, and a baggie containing 0.46 grams of methamphetamine on Simeroth's person during a patsearch and a subsequent search incident to her arrest. Materials used in manufacturing methamphetamine were found in the back seat of the Buick.

After a hearing on defendant's motion to suppress, the superior court held that defendant had not been seized within the meaning of the Fourth Amendment until Deputy Brokenbrough ordered him out of the car at gunpoint and placed him under arrest: "He was free to leave. And if he had opened the door and got out and taken a hike, then this officer would have had to decide whether he had something less than probable cause to detain him, and then he would have been detained. But he wasn't detained because he never went anywhere; but he had a right to if he wanted to." The court determined next that even if defendant had been seized at an earlier point, the traffic stop was lawful; even if the stop had been unlawful, defendant, as a passenger, lacked standing[1] to suppress the items seized from the Buick.

Following the denial of his motion to suppress, defendant pleaded guilty to manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and admitted a prior prison

---

[1] The United States Supreme Court has largely abandoned use of the word "standing" in its Fourth Amendment analysis. (See *Minnesota v. Carter* (1998) 525 U.S. 83, 87-88.) "It did so without altering the nature of the inquiry: whether the defendant, rather than someone else, had a reasonable expectation of privacy in the place searched or the items seized." (*People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3.) We have embraced the high court's formulation and no longer analyze this substantive issue as one of standing. (*Ibid.*; *People v. Valdez* (2004) 32 Cal.4th 73, 121, fn. 24.)

term enhancement (Pen. Code, § 667.5, subd. (b)). He was sentenced to four years in prison.

The Court of Appeal reversed in a published opinion. It held that a traffic stop necessarily results in a detention (and, hence, a seizure (*People v. Glaser* (1995) 11 Cal.4th 354, 363)) of both the driver and the passengers, rejecting the analysis and holdings of *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373-1374; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1367-1369; and *People v. Fisher* (1995) 38 Cal.App.4th 338, 343-344. The Court of Appeal further found that the stop was unlawful in that Deputy Broken- brough, who knew that the vehicle's application to renew its registration was in process and who had seen the temporary permit in the rear window, had "at most a hunch" that "the temporary operating permit displayed in the window might not belong to the car and, thus, it was being unlawfully operated as an unregistered vehicle." The court ruled that the evidence seized from defendant as well as from the Buick should have been suppressed.

We granted review, limited to (1) whether defendant, as a passenger in a vehicle subjected to a traffic stop, was seized within the meaning of the Fourth Amendment; and (2) whether reasonable suspicion exists that a car is unregistered when it exhibits an expired registration tab on its license plate but displays what appears to be a valid temporary operating permit in its rear window.

DISCUSSION

"In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279 [99 Cal.Rptr.2d 532, 6 P.3d 193].) We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applic-

able law applies to the facts is a mixed question of law and fact that is subject to independent review. (*Ibid.*)" (*People v. Ramos* (2004) 34 Cal.4th 494, 505.)[2] In evaluating whether the fruits of a search or seizure should have been suppressed, we consider only the Fourth Amendment's prohibition on unreasonable searches and seizures. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141.) "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." (*Rakas v. Illinois* (1978) 439 U.S. 128, 131, fn. 1.)

Prior to the vehicle stop here, Deputy Brokenbrough noticed that the registration tabs on the Buick's license plate were expired. However, he also observed a current temporary operating permit in the car's rear window and had received radio confirmation that an application for renewal of the

---

[2] State courts and the lower federal courts are divided as to the appropriate standard of review of a finding that a seizure has or has not occurred. Many courts hold that this is a question of law or a mixed question of law and fact subject to de novo review. (*U.S. v. Smith* (1st Cir. 2005) 423 F.3d 25, 31, fn. 4; *id.* at p. 36 & fn. 9 (dis. opn. of Lynch, J.) [citing cases from the Second, Third, Sixth, Eight, Tenth, and District of Columbia Circuits]; *LaDuke v. Nelson* (9th Cir. 1985) 762 F.2d 1318, 1327; accord, *State v. Kachanian* (Hawai'i Ct.App. 1995) 896 P.2d 931, 938; *State v. Harris*, (Minn. 1999) 590 N.W.2d 90, 98; *State v. Jason L.* (N.M. 2000) 2 P.3d 856, 863; *State v. Carter* (Utah Ct.App. 1991) 812 P.2d 460, 465, fn. 3; *McGee v. Com.* (Va.Ct.App. 1997) 487 S.E.2d 259, 261; *State v. Thorn* (Wn. 1996) 917 P.2d 108, 111; *State v. Garcia* (Wis.Ct.App. 1995) 535 N.W.2d 124, 126.) Other courts hold that this is a question of fact subject to review for substantial evidence or clear error. (*U.S. v. Mask* (5th Cir. 2003) 330 F.3d 330, 335; *U.S. v. Wilson* (4th Cir. 1991) 953 F.2d 116, 121; *U.S. v. Teslim* (7th Cir. 1989) 869 F.2d 316, 321; accord, *Lindsay v. State* (Alaska Ct.App. 1985) 698 P.2d 659, 661; *State v. Hill* (Conn. 1996) 675 A.2d 866, 871; *State v. Raker* (Fla.Dist. Ct.App. 2004) 883 So.2d 887, 888-889.) Because the parties here do not address the issue—and because our decision would be the same under either standard—we find it unnecessary to resolve the conflict. (See *U.S. v. Boone* (5th Cir. 1995) 67 F.3d 76, 77, fn. 1.)

vehicle's registration was indeed in process. Conceding that "[a] vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit," the Attorney General no longer argues that Deputy Brokenbrough had articulable suspicion the Buick's registration was invalid. The Attorney General argues instead that defendant has no entitlement to suppression of the evidence uncovered during the traffic stop because he, as a passenger, was not seized within the meaning of the Fourth Amendment until Deputy Brokenbrough ordered him out of the car at gunpoint and arrested him under the outstanding no-bail warrant, which provided lawful cause for the seizure. Defendant, on the other hand, argues that he was seized at the moment the driver submitted to the show of official authority and stopped the car, which preceded the deputy's discovery of the outstanding warrant.[3]

It is well settled that the driver of a vehicle that is the subject of a traffic stop is seized within the meaning of the Fourth Amendment. (*Whren v. United States* (1996) 517 U.S. 806, 809-810.) Neither this court nor the United States Supreme Court, however, has yet decided whether the driver's submission to the show of authority results in a seizure of the *passenger*. A majority of courts, including several federal circuit courts and some state courts, have embraced a per se rule that the passenger is seized at the moment the driver submits to the official show of authority. (E.g., *U.S. v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *U.S. v. Eylicio-Montoya* (10th Cir. 1995) 70 F.3d 1158, 1163-1164; *U.S. v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5; *U.S. v.*

---

[3] Defendant concedes that, as a mere passenger, his Fourth Amendment rights were not violated by the search of his codefendant's vehicle. (*Rakas v. Illinois, supra*, 439 U.S. at pp. 133, 148; accord, *People v. Valdez, supra*, 32 Cal.4th at p. 122.) He claims instead that suppression of the incriminating evidence found in the car is required because it was the fruit of an unlawful seizure of his person.

Roberson (5th Cir. 1993) 6 F.3d 1088, 1091; *U.S. v. Powell* (7th Cir. 1991) 929 F.2d 1190, 1195; *State v. Hernandez* (Fla.Dist.Ct.App. 1998) 718 So.2d 833, 836; *People v. Bunch* (Ill. 2003) 796 N.E.2d 1024, 1029; *State v. Eis* (Iowa 1984) 348 N.W.2d 224, 226; *State v. Carter* (Ohio 1994) 630 N.E.2d 355, 360; *Josey v. State* (Tex.Crim.App. 1998) 981 S.W.2d 831, 837-838; see also 6 La Fave, Search and Seizure (4th ed. 2004) § 11.3(e), pp. 194-195, fn. 277 [citing cases].) Other courts, reasoning that the passenger in a vehicle subject to a traffic investigation is stopped for practical purposes but not by virtue of the show of official authority, hold that the passenger is not seized for Fourth Amendment purposes. (E.g., *People v. Jackson* (Colo. 2002) 39 P.3d 1174, 1184-1186; *State v. Mendez* (Wn. 1999) 970 P.2d 722, 729; see also 6 La Fave, Search and Seizure, *supra*, § 11.3(e), p. 193, fn. 272 [citing cases].)

This division of authority is reflected in the courts of our own state. Some courts agree with defendant that the interference with the passenger's freedom of movement occasioned by the traffic stop constitutes a seizure. (*People v. Bell* (1996) 43 Cal.App.4th 754, 765; *People v. Hunt* (1990) 225 Cal.App.3d 498, 505; *People v. Grant* (1990) 217 Cal.App.3d 1451, 1457-1458.) Other courts agree with the Attorney General that although the driver must submit to the officer's instructions, the passenger is free to disregard the police and go about his or her business, and that the incidental restriction of the passenger's freedom of movement is therefore not a seizure. (*People v. Castellon, supra*, 76 Cal.App.4th at p. 1374; *People v. Cartwright, supra*, 72 Cal.App.4th at p. 1369 (*Cartwright*); *People v. Fisher, supra*, 38 Cal.App.4th at p. 344; *People v. Gonzalez* (1992) 7 Cal.App.4th 381, 384.)

At the heart of this debate lies the definition of a seizure in the Fourth Amendment's prohibition on "unreasonable searches and seizures." Justice Stewart's opinion in *United States v. Mendenhall* (1980) 446 U.S. 544, 554, which has

been adopted by the court in subsequent cases (e.g., *Michigan v. Chesternut* (1988) 486 U.S. 567, 573), states that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Fn. omitted.) The high court subsequently made clear that this test "states a *necessary*, but not a *sufficient*, condition for seizure." (*California v. Hodari D.* (1991) 499 U.S. 621, 628 (*Hodari D.*).) That is, there must also be an actual taking into custody, whether by the application of physical force or by submission to the assertion of authority. (*Id.* at p. 626.) The court has also cautioned against an undue focus on the fact that government action caused some restriction on an individual's freedom of movement: "'a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever there is a governmentally caused and *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied.*'" (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 844, quoting *Brower v. County of Inyo* (1989) 489 U.S. 593, 596-597.) Finally, the court has reminded us that where the individual may not feel free to leave for reasons *independent* of the police conduct—such as a passenger on a bus that is scheduled to depart shortly—the proper inquiry is "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (*Florida v. Bostick* (1991) 501 U.S. 429, 437; accord, *People v. Celis* (2004) 33 Cal.4th 667, 673.)

It is passing strange, then, that defendant focuses so little attention on the definition of a seizure. Defendant (like the Court of Appeal below and the other cases embracing the majority view) instead advances an argument that rests on

two other foundations: (1) dicta from United States Supreme Court decisions; and (2) the fact that a traffic stop curtails the freedom of movement of the passenger as well as the driver.

Although defendant concedes that the high court has not decided whether a passenger is necessarily seized by virtue of a traffic stop, he asserts that dicta from the high court has "strongly hinted" in that direction. In *Delaware v. Prouse* (1979) 440 U.S. 648, 653, for example, the court observed that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendment[], even though the purpose of the stop is limited and the resulting detention quite brief." (See also *Berkemer v. McCarty* (1984) 468 U.S. 420, 436-437 [quoting *Prouse*].) In *Colorado v. Bannister* (1980) 449 U.S. 1, 4, footnote 3, the court reiterated that "[t]here can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment," citing *Prouse*. There is no debate here, though, whether a traffic stop results in a seizure. The issue, rather, is *who* (or what) has been seized. Inasmuch as *Bannister* and *Berkemer* involved the driver of the vehicle (*Bannister, supra*, 449 U.S. at p. 4; *Berkemer, supra*, 468 U.S. at p. 423) and *Prouse*, according to the opinion of the state supreme court, involved the owner and "operator" of the vehicle (*Prouse, supra*, 440 U.S. at p. 650, fn. 1), none of these cases is particularly illuminating on the status of a mere passenger.

Defendant, like the courts embracing the majority view, also relies on the observation in *Berkemer v. McCarty, supra*, 468 U.S. at page 436, that "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle." It is important to recognize, however, that *Berkemer*'s observation was made in the context of whether a motorist detained pursuant to a traffic stop was in custody for purposes of the *Fifth* Amendment. (*Id.* at p. 435.) Whether a person is in custody for purposes of

the Fifth Amendment is an inquiry distinct from whether a person has been seized within the meaning of the Fourth Amendment. (*U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 131 ["The 'custody' that implicates the *Miranda* rule is conceptually distinct from a seizure implicating the Fourth Amendment"]; *U.S. v. Smith* (7th Cir. 1993) 3 F.3d 1088, 1097 [the determination of custody under the Fifth Amendment requires "a completely different analysis" from that under the Fourth Amendment].) Indeed, as the high court has emphasized, "'a governmentally caused termination of an individual's freedom of movement'" does not necessarily establish that a seizure under the Fourth Amendment has occurred. (*County of Sacramento v. Lewis, supra*, 523 U.S. at p. 844.) A police detention of an orderly pushing a wheelchair-bound individual or a detention of a parent pushing a child in a stroller may well incidentally curtail the freedom of action of the passengers who are dependent on those adults. The detention of the orderly or parent will also, to use the dissent's phrasing, "interrupt [the] journey" (dis. opn., *post*, at p. 1) of the wheelchair or the stroller. But it is absurd to say that either passenger has thereby been seized within the meaning of the Fourth Amendment.

The cases embracing the majority view also assert that "[n]o principled basis exists for distinguishing between the privacy rights of passengers and drivers in a moving vehicle. When the vehicle is stopped they are equally seized; their freedom of movement is equally affected." (*State v. Eis, supra*, 348 N.W.2d at p. 226; see also *People v. Bell, supra*, 43 Cal.App.4th at p. 763.) In reality, though, the passenger is not subject to the same restraints as the driver. The driver is obliged to remain at the scene until the completion of the officer's investigation. "[T]he passenger is stopped too, but only coincidentally." (*People v. Jackson, supra*, 39 P.3d at p. 1185.) Absent further direction from the officer effecting the stop (see *Maryland v. Wilson* (1997) 519 U.S. 408, 410) or some indication that the passenger is the subject of the

officer's investigation or show of authority, the passenger is free to ignore the police presence and go about his or her business. Alternatively, the passenger may choose to wait until the investigation of the driver is completed. In either case, "it is this element of choice that distinguishes the passenger's circumstance from the driver's, for the driver has been seized and is therefore not free to go." (*Jackson, supra*, at p. 1185.) The fact that defendant's freedom of movement was momentarily curtailed by the traffic stop thus does not determine whether he was seized. To answer that question we must return to the high court's definition of a "seizure."

A seizure occurs when the police, by the application of physical force or show of authority, seek to restrain the person's liberty (*Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16; *County of Sacramento v. Lewis, supra*, 523 U.S. at p. 844); the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter (*Florida v. Bostick, supra*, 501 U.S. at p. 436); and the person actually submitted to that authority (*Hodari D., supra*, 499 U.S. at p. 626) for reasons not "independent" of the official show of authority (*Florida v. Bostick, supra*, 501 U.S. at p. 436). Admittedly, the application of this test to particular circumstances is sometimes more an art than a science. (See *Michigan v. Chesternut, supra*, 486 U.S. at p. 573 [the test "is necessarily imprecise"].) As the high court has emphasized, "for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.'" (*United States v. Drayton* (2002) 536 U.S. 194, 201; accord, *People v. Souza* (1994) 9 Cal.4th 224, 235.) In this case, defendant has not shown that he, as the passenger, was the subject of the deputy's show of authority or that he actually submitted to it.

Deputy Brokenbrough's flashing lights were directed at the driver, Karen Simeroth, and not at defendant. Indeed, the record does not indicate that Brokenbrough was even aware defendant was in the car prior to the vehicle stop. Once the car came to a stop, the deputy approached the driver's side of the vehicle, without blocking defendant's exit, brandishing a weapon at him, or making any intimidating movements towards him. In these circumstances, one cannot say that defendant was the subject of the deputy's investigation or show of authority prior to the time the deputy ordered him out of the vehicle. (See *United States v. Drayton, supra*, 536 U.S. at pp. 203-204 [no seizure occurred when officers boarded the bus and began questioning passengers].)

Rather, "[a]n officer causing a vehicle to pull over in transit is conducting an investigatory stop of the *driver*." (*People v. Jackson, supra*, 39 P.3d at p. 1182, italics added.) "[T]he display of authority and control is directed at the driver, not the passenger." (*Id.* at p. 1185.) "While we are all familiar with the sinking feeling a driver experiences upon seeing police lights in the rearview mirror, few of us sense impending doom when we are in the passenger seat." (*Cartwright, supra*, 72 Cal.App.4th at pp. 1374-1375; see also *People v. Jackson, supra*, at p. 1185.) Thus, as the dissent concedes, "[a] passenger may not be the subject of a police investigation, at least in the initial phase of the traffic stop." (Dis. opn., *post*, at p. 2.)

More importantly, defendant, as the passenger, had no ability to submit to the deputy's show of authority. As the *Cartwright* court noted, the passenger "is not a participant in the stop, but an observer." (*Cartwright, supra*, 72 Cal.App. 4th at p. 1375.) Not only is the driver the one the officer is seeking to restrain, but the driver is the only one who, by stopping the car, can submit to the officer's assertion of authority. The passenger may be asleep or otherwise unaware of the officer's presence. The passenger may disagree with the driver's decision to submit to the officer's authority and

may even object vociferously, but to no effect. "The passenger simply has no say in the matter." (*Id.* at p. 1367.)

To be sure, the passenger must in most cases remain in the car until it stops, and to that extent (as the dissent points out) the passenger's freedom is curtailed. But it is critical, for purposes of the Fourth Amendment analysis, to determine *why* the passenger's freedom is curtailed. Although defendant points out that "it is simply not possible for a passenger to avoid being literally and physically detained under these circumstances, however momentarily," this is so because, under the vast majority of circumstances, it is unsafe for the passenger to exit a moving vehicle. The passenger will also, in most cases, prefer to await the completion of the traffic stop and continue en route in the company of the driver. Neither factor, however, means that the passenger has been seized within the meaning of the Fourth Amendment. (*Florida v. Bostick, supra*, 501 U.S. at p. 436 ["Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus"]; see generally *United States v. Drayton, supra*, 536 U.S. at p. 206 ["The arrest of one person does not mean that everyone around him has been seized by police"].) The "liberty" contemplated by the high court's definition of a seizure—i.e., "when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at *liberty* to ignore the police presence and go about his business"'" (*Kaupp v. Texas* (2003) 538 U.S. 626, 629 italics added)—refers not to whether the individual has the physical *capacity* to leave the scene but to whether, assuming the individual had the physical capacity to do so, he or she would feel free to depart or otherwise to conduct his or her affairs as though the police were not present. (See *Bostick, supra*, 501 U.S. at p. 436 [that "Bostick's movements were 'confined' . . . says nothing about whether or not the police conduct at issue was coercive"].) After all, an individual may

manifest an unwillingness to engage with the police not only by departing the area, but also by staying put and declining to answer questions or otherwise ignoring police inquiries. Similarly, a seizure can occur even though the individual has the physical capacity to leave the scene.

Neither defendant nor the dissent ever explains why the same analysis should not apply to the detention of a *moving* vehicle containing a driver and passenger and the detention of a *parked* vehicle containing a driver and passenger—or, for that matter, the detention of a motorcycle or a bicycle with a driver and passenger. (Cf. *United States v. Drayton, supra*, 536 U.S. at p. 204 [that the encounter took place on a bus rather than on the street "does not on its own transform standard police questioning of citizens into an illegal seizure"].) Absent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot—i.e., exit the vehicle or dismount from the motorcycle or bicycle and thereby terminate the encounter with the officer. (Cf. *U.S. v. Slater* (8th Cir. 2005) 411 F.3d 1003, 1005 [passenger was not seized while driver took field sobriety tests].) In this case, for example, defendant indicated his awareness of the available options by opening, and then closing, the passenger door.

The distinction between a passenger whose progress is stopped because the driver is seized and a passenger who is himself or herself seized is consistent with the high court's analysis in *Maryland v. Wilson, supra*, 519 U.S. 408, which addressed the separate issue whether a police officer may as a matter of course order not just the driver to exit the vehicle during a traffic stop, but the passengers as well. The high court found that in light of the interest in officer safety, ordering the passenger out of the vehicle was not an unreasonable seizure, but declined to decide whether the passenger could be held for the entire duration of the stop. (*Id.* at p. 415, fn. 3.) The high court did, however, acknowledge one important distinction between the driver and the passengers:

"There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But *as a practical matter*, the passengers are already stopped by virtue of the stop of the vehicle." (*Id.* at pp. 413-414, italics added.) Justice Stevens's dissenting opinion agreed with the majority's implied distinction between being stopped as a *practical* matter and being seized as a *constitutional* matter: the intrusion on a passenger's freedom of movement occasioned by the traffic stop "was a necessary by-product of the lawful detention of the driver. But the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state-imposed delay not directed at a particular individual constitutes a seizure of that person." (*Id.* at p. 420 (dis. opn. of Stevens, J.).)

The rule proposed by the defendant and endorsed by the Court of Appeal and the dissent here, in which a seizure occurs whenever the defendant's freedom of movement "is significantly curtailed by an officer's act of making the driver stop the car," would find a seizure in these circumstances of state-imposed delay. Indeed, the proposed rule would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority. It would be inaccurate to say that these motorists, whose journey is interrupted by virtue of the traffic stop of another vehicle but who do not actually submit to the show of police authority, are seized within the meaning of the Fourth Amendment. The same is true of a passenger such as defendant, who likewise suffers a curtailment of his freedom but does not actually submit to the show of police authority.[4]

---

[4] The dissent asserts that the requirement of submission "simply does not apply in these circumstances" (dis. opn., *post*, at p. 3), but, as the high

Defendant's proposed rule would also make unduly problematic the determination of when a seizure has ended. He asserts that "[w]hether a passenger remains detained thereafter may depend upon whether, under the circumstances, a reasonable person would feel free to leave while the officer deals with the driver." But very rarely does the officer affirmatively express an investigative interest (or lack thereof) in the passengers of a detained vehicle. The officer's interest in such circumstances, as defendant concedes, is with the driver. This suggests that, under defendant's approach, the alleged seizure of a passenger must terminate of its own accord, either by the passage of time or by the officer's focus on the driver. If the seizure terminates simply by the passage of time, then the question arises of how many minutes the passengers must wait. If, on the other hand, the seizure terminates at the end of the traffic stop or as soon as the

---

court has made clear, a seizure "requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority. [¶] . . . 'There can be no arrest without either touching or submission.'" (*Hodari D., supra*, 499 U.S. at pp. 626-627.)

Moreover, the dissent's analysis would effectively diminish protections for passengers. If, as the dissent contends, a traffic stop inflexibly results in a seizure of the passengers until the officer explicitly says otherwise, then any passenger who nonetheless tried to proceed on his or her way could be arrested under Penal Code section 148 (and then subjected to a search incident to the arrest) for resisting or delaying the officer in the performance of his or her duties. (See, e.g., *In re Muhammad C.* (2002) 95 Cal.App.4th 1325, 1329; *People v. Quiroga* (1993) 16 Cal.App.4th 961, 967.) We think it more sensible to leave it up to the officer, once cause for the vehicle stop has been established, to decide who should be seized and when. And, in light of the high court's "clear direction that an assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account '"all of the circumstances surrounding the incident"' in each individual case" (*Michigan v. Chesternut, supra*, 486 U.S. at p. 572), it is also more appropriate to examine the totality of the circumstances before determining whether the passenger has been seized during a traffic stop.

officer tells the passengers they are free to leave, then it follows that the passengers are *also* at liberty to go about their business if, at an even earlier stage, the passengers can reasonably draw that same inference about the focus of the officer's investigation or show of authority. In this case, for example, defendant reasonably would have surmised that Deputy Brokenbrough was focused on the driver when the traffic stop was initiated. Because defendant knew he was free to ignore the police presence and go about his business at that stage, even if he was unable as a practical matter to leave the scene until the car came to a halt, he could not have been seized merely by the initiation of the traffic stop.

The dissent would find that passengers generally, and defendant in particular, are seized from the inception of every traffic stop, but the dissent's reasoning is faulty. Although the dissent concedes that a passenger may not be the subject of the police investigation, at least in the initial phase of the traffic stop, it contends that a seizure nonetheless occurs because "the officer *has the authority*, as a matter of law, to order that the passengers . . . get out of the vehicle" once the vehicle pulls over. (Dis. opn., *post*, at p. 1, italics added.) We do not doubt the officer has such authority, which is recognized explicitly in *Maryland v. Wilson, supra*, 519 U.S. at page 410, nor do we dispute that the passenger is seized once the officer *actually invokes that authority to order the passenger out of the car*. But the dissent offers no authority for its critical assumption that the mere *potential* an officer *might* invoke such authority itself constitutes a seizure.

The dissent also asserts that the failure to deem a passenger automatically seized in every traffic stop will lead to anomalous consequences in that the driver, who has been seized, will be able to suppress the fruits of an unlawful seizure, but the passenger, who has not been seized, may not be able to obtain such relief. If this is an anomaly, it is hardly unique, inasmuch as the potential for unequal treatment has

existed under similar circumstances ever since the high court abolished automatic standing. In *Rakas v. Illinois, supra*, 439 U.S. 128, for example, the high court held that mere passengers—unlike drivers or owners of the vehicle—had no legitimate expectation of privacy that was violated by a vehicle search. (*Id.* at pp. 148-149; accord, *People v. Valdez, supra*, 32 Cal.4th at p. 122). The high court has also remarked that a casual visitor would similarly be unable to challenge a house search (*Rakas, supra*, at p. 142; accord, *People v. Ooley* (1985) 169 Cal.App.3d 197, 202-203; see also *People v. Ayala, supra*, 23 Cal.4th at p. 255 [invitee or social guest has no expectation of privacy in business premises]), although the owner or other residents would be able to do so.

Thus, the Fourth Amendment does not concern itself with "treat[ing] driver and passenger alike" in all circumstances (dis. opn., *post*, at p. 5), nor does assuring equity between drivers and passengers justify expanding the reach of the exclusionary rule beyond what the Fourth Amendment requires. (See *Alderman v. United States* (1969) 394 U.S. 165, 174 ["There is no necessity to exclude evidence against one defendant in order to protect the rights of another"].) "'Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.'" (*In re Lance W.* (1985) 37 Cal.3d 873, 882, quoting *Rakas v. Illinois, supra*, 439 U.S. at p. 137.) Accordingly, "the deterrent purpose of the exclusionary rule does not require its application when unlawfully seized evidence is offered against a defendant whose own rights have not been compromised by the unlawful seizure." (*Lance W.*, at p. 882.)

We emphasize that passengers who are in vehicles subjected to unjustified traffic stops are not without constitutional protection. Once the vehicle has been stopped, the passenger may not be detained thereafter without reasonable

suspicion the passenger is involved in criminal activity. (*People v. Souza, supra*, 9 Cal.4th at p. 230; cf. *Maryland v. Wilson, supra*, 519 U.S. at p. 410 [police may order the driver and passengers of a "lawfully stopped" car to exit the vehicle].) Furthermore, neither the passenger nor the passenger's belongings in the vehicle may be searched without lawfully acquired cause to justify an arrest (*New York v. Belton* (1981) 453 U.S. 454) or a search (*Wyoming v. Houghton* (1999) 526 U.S. 295). A passenger in a car subjected to an unjustified stop may also be able to prosecute a civil suit against the police under the rubric of substantive due process. (See *County of Sacramento v. Lewis, supra*, 523 U.S. at pp. 844-845.) There is thus no need to torture the definition of a seizure to protect the security of passengers.

We therefore hold that because the deputy effected a traffic stop of Simeroth's vehicle without any indication that defendant, the vehicle's passenger, was the subject of his investigation or show of authority, defendant was not seized when Simeroth submitted to the deputy's show of authority and brought the vehicle to a stop. Because defendant claims only that the traffic stop itself constituted a seizure, we need not consider whether defendant was seized when Deputy Brokenbrough asked him to identify himself or whether, assuming such conduct constituted a seizure, it was justified by the deputy's reasonable suspicion that he was a parolee at large.

DISPOSITION

The judgment of the Court of Appeal is reversed.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.
KENNARD, J.
CHIN, J.

DISSENTING OPINION BY CORRIGAN, J.

I respectfully dissent. Passengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense. Certainly no one can safely leave the vehicle before it stops. Once it has pulled over, the officer has the authority, as a matter of law, to order that the passengers remain inside (*People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374-1375), or get out of the vehicle (*Maryland v. Wilson* (1997) 519 U.S. 408, 410). This authority is soundly based on the need to protect the officer's safety. One of its necessary consequences, however, is that the passengers, having been forced to interrupt their journey, are deprived of further freedom of movement. Accordingly, the passengers have been detained and thus "seized" for Fourth Amendment purposes.

The precedents cited by the majority support this conclusion, or are distinguishable. Under the *Mendenhall* test, a person is detained if, under the circumstances, "a reasonable person would have believed that he was not free to leave." (*United States v. Mendenhall* (1980) 446 U.S. 544, 554.) When a police officer effects a traffic stop, a passenger's freedom of movement has been restrained by the intentional act of a government agent. (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 844.) The passenger is detained for a reason that is not "independent of police conduct." (*Florida v. Bostick* (1991) 501 U.S. 429, 436.) Indeed, the passenger's freedom of movement is abruptly interrupted precisely because of the officer's conduct.

The situation was quite different in *Bostick*. There, the defendant was a passenger sitting on a parked bus. When the officers boarded he was going nowhere. His freedom of movement was not curtailed by anything the officers said or did. (*Florida v. Bostick, supra*, 501 U.S. at pp. 431-432, 436.) Further, the *Bostick* court did not hold that there was no seizure. It simply rejected the state court's conclusion that

officers may not ask bus passengers for consent to search. (*Id.* at p. 437.) As Justice O'Connor pointed out for the majority, well-settled Fourth Amendment jurisprudence would have allowed the officers to ask Bostick for his consent to search in the terminal, on the street, or in an airport. (*Id.* at p. 434.) The mere fact that consent to search was sought on a parked bus was not dispositive.

California v. Hodari D. (1991) 499 U.S. 621 does hold that submission to governmental authority is required for a detention to take place. Hodari and other young men were standing on a street and fled when police drove by. Hodari discarded contraband as he ran from an officer. The Court of Appeal suppressed the evidence on the ground that Hodari was detained when he saw the officer running toward him. (*Id.* at pp. 622-623.) The United States Supreme Court reversed, ruling that when a suspect does not yield to a show of authority, no seizure occurs. (*Id.* at p. 626.) Flight is clearly not the same as submission. However, the *Hodari D.* court had no occasion to consider anything like the situation of passengers during a traffic stop.

A passenger may not be the subject of a police investigation, at least in the initial phase of the traffic stop.[1] Passengers are detained for a different and equally important purpose: to ensure the safety of the officer. The actual submission requirement discussed by the *Hodari D.* court simply does not apply in these circumstances, which present entirely distinct practical and legal considerations.[2] Individ-

---

[1] In some cases, of course, the officer initiates a traffic stop to investigate a passenger. (See, e.g., *In re William J.* (1985) 171 Cal.App.3d 72, 77.) In those cases, the vehicle's occupants will often be unaware of the reason for the stop. Nevertheless, the rule adopted in the majority opinion requires the suspect to realize that he or she is the focus of the officer's investigation for the Fourth Amendment to apply.

[2] The majority reasons that if passengers are detained during a traffic stop for Fourth Amendment purposes, they would be subject to prose-

uals on the street submit to an officer's authority by stopping or remaining in place in response to the officer's directions. An individual who sees a policeman and runs away has demonstrably not submitted to police authority.

Vehicle passengers are in a different situation. They stop when the car stops. If the driver pulls over in response to an officer's show of authority, the passengers' freedom of movement is curtailed to the same extent as the driver's. As the majority notes, "a police officer may as a matter of course order not just the driver to exit the vehicle during a traffic stop, but the passengers as well." (Maj. opn., *ante*, at p. 14; see *Maryland v. Wilson, supra*, 519 U.S. at p. 410.) The officer may also order the passengers to stay in the car. (*People v. Castellon, supra*, 76 Cal.App.4th at pp. 1374-1375; *United States v. Moorefield* (3rd Cir. 1997) 111 F.3d 10, 12-13.)[3] This per se rule, based on the need to ensure officer

---

cution for "fleeing from a proper investigative detention" (Pen. Code, § 148) if they attempt to leave the scene. (Maj. opn., *ante*, at pp. 15-16, fn. 4.) However, that liability would arise only after a passenger became the subject of the officer's investigation. For this purpose, the rule proposed by the majority functions well. Penal Code section 148 would apply to passengers who flee in circumstances that would indicate they were the subject of the officer's investigation.

[3] While the United States Supreme Court has yet to address whether passengers may be ordered to remain in a vehicle during a traffic stop, the reasoning of the *Castellon* and *Moorefield* courts on this point is sound. The same considerations of officer safety that justify the rule authorizing the removal of passengers from a vehicle support allowing the officer to keep the passengers inside. (*People v. Castellon, supra*, 76 Cal.App.4th at pp. 1374-1375; *United States v. Moorefield, supra*, 111 F.3d at p. 13; see also *State v. Shearin* (N.C.Ct.App. 2005) 612 S.E.2d 371, 377-378 [citing cases]; cf. *Maryland v. Wilson, supra*, 519 U.S at p. 413.) A rule permitting passengers to leave the vehicle and wander around outside the officer's field of vision during a traffic stop would be a dangerous one indeed.

I would disapprove *Castellon*, however, insofar as it held that passengers are not detained from the inception of a traffic stop. (*People v. Castellon, supra*, 76 Cal.App.4th at pp. 1373-1374.)

safety, requires no showing of reasonable suspicion. (*Maryland v. Wilson, supra*, 519 U.S at p. 412.) Driver and passenger alike are "subjected to the demands and control of the police officer" during the stop. (*United States v. Kimball* (1st Cir. 1994) 25 F.3d 1, 5.)

The *Wilson* court observed that "[o]n the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers." (*Maryland v. Wilson, supra*, 519 U.S at p. 413.) The court decided the intrusion on passengers' liberty is nevertheless justified, partly because "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." (*Id.* at p. 414.) By stopping the vehicle, the officer has exerted authority over everyone in it. Because the liberty interest of passengers is *stronger* than that of drivers, they too should be afforded the protections of the Fourth Amendment.

To conclude that passengers are free to leave the scene until an officer actually exercises the authority granted by *Wilson* (maj. opn., *ante*, at p. 17), overlooks the fact that the officer has already interfered with the passengers' freedom of movement. It is not, as the majority suggests, the mere potential that an officer might order a passenger out of the car that results in a detention. It is also the prior actual application of the officer's authority in pulling the vehicle over. The stop gives rise to the officer's legitimate power under *Wilson* and *Castellon* to control the passengers' movements without any particularized justification. That official control differentiates passengers detained during a traffic stop from other citizens who are only incidentally impeded by an exercise of state authority. (See maj. opn., *ante*, at p. 15.)

The majority's approach leads to anomalous consequences. For example, when an officer pulls over a car, the driver and passengers may all be considered to be in constructive

possession of contraband found in the vehicle. Under the majority's rule, however, the driver would be protected by the Fourth Amendment but the passengers would not, even though the Supreme Court has described the passengers' liberty interest as stronger than the driver's. The majority also bars passengers from challenging the traffic stop if the officer arrests them before exerting any authority under *Wilson*, but would permit passengers to challenge the stop if the grounds for arrest were discovered after the officer gave directions controlling their movements. It is true, as the majority observes, that Fourth Amendment jurisprudence is not free of anomaly. (Maj. opn., *ante*, at p. 18.) However, when given the opportunity, we should eschew incongruity. Surely consistency is preferable to anomaly.

I would hold that passengers are "seized" from the time a car is pulled over until the officer ends the restraint on their liberty, either by telling them they are free to leave or by releasing the occupants of the vehicle after completing the traffic stop. This approach satisfies the majority's concern with determining when a seizure ends. (Maj. opn., *ante*, at p. 16.) It provides a clear and easily applied rule, and imposes no additional burdens on law enforcement. It is consistent with the policy of granting police officers broad latitude to control the movements of passengers during traffic stops. It treats driver and passenger alike, protecting and clarifying their rights and obligations.

The majority contends such a per se rule is inconsistent with Fourth Amendment jurisprudence requiring consideration of all the circumstances of the individual case in determing whether there has been a "seizure." (Maj. opn., *ante*, at p. 16, fn. 4.) However, the *Wilson* court made an express exception to the usual practice of avoiding bright-line rules in the Fourth Amendment context when it decided that passengers, like drivers, may routinely be ordered to leave the vehicle during a traffic stop. (*Maryland v. Wilson, supra*, 519

U.S at p. 413, fn. 1.) The per se rule of *Wilson* justifies the rule proposed here. Because, as a matter of law, passengers' freedom of movement is subject to the control of the officer during a traffic stop, passengers should be permitted as a matter of law to challenge the legality of the stop. No conflict with the body of Fourth Amendment law arises from this commonsense approach. Further, the analysis takes into account the most relevant circumstance: the passengers' freedom has been limited by the officer's exercise of authority.

The majority expresses concern about unduly expanding the reach of the exclusionary rule. (Maj. opn., *ante*, at p. 18.) However, no evidence discovered during the course of a legally justified traffic stop would be affected if we held that passengers are seized along with drivers. The majority acknowledges that most jurisdictions have accepted that rule, and the weight of authority on this point is indeed substantial. Eight of the federal circuit courts of appeal hold that passengers are detained during a traffic stop.[4] There are no cases on point from the other four circuits. Twenty-one state courts have adopted the same view.[5] The majority refers to

---

[4] See *United States v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 5 (characterizing the rule as "doctrinal bedrock"); *United States v. Rusher* (4th Cir. 1992) 966 F.2d 868, 874, footnote 4; *United States v. Grant* (5th Cir. 2003) 349 F.3d 192, 196; *United States v. Perez* (6th Cir. 2003) 440 F.3d 363, 369; *United States v. Powell* (7th Cir. 1991) 929 F.2d 1190, 1195; *United States v. Green* (8th Cir. 2001) 275 F.3d 694, 699; *United States v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *United States v. Eylicio-Montoya* (10th Cir. 1995) 70 F.3d 1158, 1162-1164.

[5] See *State v. Gomez* (Ariz.Ct.App. 2000) 6 P.3d 765, 766; *State v. Bowers* (Ark. 1998) 976 S.W.2d 379, 381; *State v. Hernandez* (Fla.Dist.Ct.App. 1998) 718 So.2d 833, 836; *State v. Cooper* (Ga.Ct.App. 2003) 579 S.E.2d 754, 756; *State v. Haworth* (Idaho 1994) 679 P.2d 1123, 1124; *People v. Bunch* (Ill. 2003) 796 N.E.2d 1024, 1029; *McKnight v. State* (Ind. Ct.App. 1993) 612 N.E.2d 586, 588; *State v. Eis* (Iowa 1984) 348 N.W.2d 224, 226; *State v. Hodges* (Kan. 1993) 851 P.2d 352, 360-362; *In re Albert S.* (Md.Ct.Spec.App. 1995) 664 A.2d 476, 480-481; *State v. Harms* (Neb. 1989) 449 N.W.2d 1, 4-5; *State v. Scott* (Nev. 1994)

only two states where its analysis is followed.[6] If the results of permitting passengers to challenge traffic stops were crippling to law enforcement, one would expect the practice to be less widely followed. At least one state, Wisconsin, has reconsidered and rejected its former minority view. (*State v. Harris, supra*, 557 N.W.2d at pp. 248, 251.) The majority opinion provides no sound basis in reason or policy to depart from the rule followed in nearly all other jurisdictions that have considered the question. California too should grant passengers the same Fourth Amendment rights as drivers during traffic stops.

---

877 P.2d 503, 508; *State v. Creech* (N.M.Ct.App. 1991) 806 P.2d 1080, 1082 (but see *State v. Affsprung* (N.M.Ct.App. 2004) 87 P.3d 1088, 1092-1094); *People v. Smith* (App.Div. 1984) 483 N.Y.S.2d 62, 63; *State v. Carter* (Ohio 1994) 630 N.E.2d 355, 360; *State v. Scott* (Or.Ct.App. 1982) 650 P.2d 985, 987, and footnote 4 (relying on statute, but noting that Fourth Amendment protected passenger's expectation not to be stopped without reasonable suspicion); *State v. Wilson* (S.D. 2004) 678 N.W.2d 176, 181; *Kothe v. State* (Tex.Crim.App. 2004) 152 S.W.3d 54, 61; *State v. Harris* (Wis. 1996) 557 N.W.2d 245, 251; *Parkhurst v. State* (Wyo. 1981) 628 P.2d 1369, 1374 (relying on state constitution); *State v. Otteson* (Utah Ct.App. 1996) 920 P.2d 183, 185.

[6] See *People v. Jackson* (Colo. 2002) 39 P.3d 1174, 1184-1186; *State v. Mendez* (Wn. 1999) 970 P.2d 722, 729; maj. opn., *ante*, at page 7.

The Delaware courts appear to acknowledge that the majority opinion's view is technically correct, but nevertheless permit passengers to challenge the basis for a traffic stop. (*Jarvis v. State* (Del. 1991) 600 A.2d 38, 41, fn. 1; *Harris v. State* (Del.Supr.Ct. 2002) 806 A.2d 119, 123, fn. 9.)

In *State v. Affsprung, supra*, 87 P.3d at pages 1092-1094, the New Mexico Court of Appeals assumed a passenger was not detained at the same time as a driver, and conducted a fact-specific analysis, without referring to an earlier New Mexico case holding that passengers may challenge the grounds for a traffic stop (*State v. Creech, supra*, 806 P.2d at p. 1082).

CORRIGAN, J.

I CONCUR:

WERDEGAR, J.
MORENO, J.

IN THE SUPREME COURT OF CALIFORNIA
Court of Appeal
Third Appellate District

[Filed AUG. 30, 2006]

No. C040754, S123133
En Banc

THE PEOPLE,
Plaintiff and Respondent,

v.

BRUCE EDWARD BRENDLIN,
Defendant and Appellant.

Petition for rehearing DENIED.

Werdeger, Moreno, and Corrigan, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
MAR 5 - 2007
OFFICE OF THE CLERK

No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ELIZABETH CAMPBELL*
2407 J Street
Suite 301
Sacramento, CA 95816
(916)-441-3792

Counsel for Petitioner

* Counsel of Record

March 5, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Factual Background	2
B. California Supreme Court Decision	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. THE UNREASONABLE STOP CONSTRAINED PETITIONER'S LIBERTY AND PRIVACY INTERESTS AND HE WAS THEREBY SEIZED FOR FOURTH AMENDMENT PURPOSES.	8
A. A Passenger's Fourth Amendment Rights Are Well Established	10
B. Passengers Are Seized Within The Meaning Of The Fourth Amendment When Authorities Stop The Car	11
C. The Vast Majority Of The Courts To Have Considered These Questions Have Found That A Traffic Stop Constitutes A Seizure Of All Occupants Of The Seized Vehicle	14
II. THE CASE LAW FROM THIS COURT RELIED UPON BY THE CALIFORNIA SUPREME COURT IS IN APPOSITE	21
III. A PASSENGER'S DETENTION LOGICALLY ENDS WHEN THE AUTHORITY RESPONSIBLE FOR THE STOP GIVES PERMISSION OR WHEN THE STOP ITSELF CONCLUDES	24

TABLE OF CONTENTS – continued

Page

IV. THE UNREASONABLENESS OF THE STOP HERE WARRANTS SUPPRESSION OF THE EVIDENCE AGAINST PETITIONER 26

CONCLUSION 31

TABLE OF AUTHORITIES

CASES Page

Arizona v. *Evans*, 514 U.S. 1 (1995) 27
Berkemer v. *McCarty*, 468 U.S. 420 (1984) 11, 18
Brower v. *County of Inyo*, 489 U.S. 593 (1989) ...*passim*
Brown v. *Texas*, 443 U.S. 47 (1979) 9
California v. *Hodari D.*, 499 U.S. 621 (1991) 19, 21
Corngold v. *United States*, 367 F.2d 1 (9th Cir. 1966) 20
Delaware v. *Prouse*, 440 U.S. 648 (1979) 10, 12, 13, 21
Florida v. *Bostick*, 501 U.S. 429 (1991) 21, 22, 23
Florida v. *Royer*, 460 U.S. 491 (1983) 22
Howard v. *State*, 888 S.W.2d 166 (Tex. Crim. App. 1994) 15
Hudson v. *Michigan*, 126 S. Ct. 2159 (2006) 28, 29
Illinois v. *Krull*, 480 U.S. 340 (1987) 26
Jarvis v. *State*, 600 A.2d 38 (Del. Super Ct.), *aff'd sub nom. Mitchell* v. *State*, 604 A.2d 418 (Del. 1991) 16
Mapp v. *Ohio*, 367 U.S. 643 (1961) 27
Maryland v. *Pringle*, 540 U.S. 366 (2003) 25, 26
Maryland v. *Wilson*, 519 U.S. 408 (1997) .....*passim*
McKnight v. *State*, 612 N.E.2d 586 (Ind. Ct. App. 1993) 15
Michigan v. *Summers*, 452 U.S. 692 (1981) 12
Ott v. *State*, 600 A.2d 111 (Md. 1992) 15
Pennsylvania v. *Williams*, 434 U.S. 106 (1997) 10, 12
Pa. Bd. of Prob. & Parole v. *Scott*, 524 U.S. 357 (1998) 27, 31
People v. *Brendlin*, 8 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004), *rev'd*, 136 P.3d 845 (Cal. 2006) 5
People v. *Brendlin*, 136 P.3d 845 (Cal. 2006) .....*passim*
People v. *Bunch*, 764 N.E.2d 1189 (Ill. App. Ct. 2002) 14

TABLE OF AUTHORITIES – continued

Page

People v. *Jackson*, 39 P.3d 1174 (Colo. 2002) 16, 17
People v. *Kunath*, 425 N.E.2d 486 (Ill. App. Ct. 1981) 15
People v. *Lagrone*, 464 N.E.2d 712 (Ill. App. Ct. 1984) 15
Rakas v. *Illinois*, 439 U.S. 128 (1978) 17
Skinner v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) 20
State v. *Bowers*, 976 S.W.2d 379 (Ark. 1998) 15
State v. *Carter*, 630 N.E.2d 355 (Ohio 1994) 15
State v. *Creech*, 806 P.2d 1080 (N.M. Ct. App. 1991) 15
State v. *DeMasi*, 419 A.2d 285 (R.I. 1980), *vacated on other grounds*, 452 U.S. 934 (1981) 15
State v. *Eis*, 348 N.W.2d 224 (Iowa 1984) 15
State v. *Epperson*, 703 P.2d 761 (Kan. 1985) 15
State v. *Gomez*, 6 P.3d 765 (Ariz. Ct. App. 2000) .. 15
State v. *Harms*, 449 N.W.2d 1 (Neb. 1989) 15
State v. *Harris*, 557 N.W.2d 245 (Wis. 1996) 15
State v. *Haworth*, 679 P.2d 1123 (Idaho 1984) 15
State v. *Higgins*, 884 P.2d 1242 (Utah 1994) 15
State v. *Krebs*, 504 N.W.2d 580 (S.D. 1993) 15
State v. *Mendez*, 970 P.2d 722 (Wash. 1999) 16, 17
State v. *Stott*, 503 N.W.2d 822 (Neb. 1993), *overruled on other grounds*, *State* v. *Johnson*, 589 N.W.2d 108 (Neb. 1999) 15
State v. *Wilson*, 867 P.2d 1175 (N.M. 1994) 15
Terry v. *Ohio*, 392 U.S. 1 (1968) 19, 22, 27
United States v. *Ameling*, 328 F.3d 443 (8th Cir. 2003) 14
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 9

TABLE OF AUTHORITIES – continued

Page

United States v. *Brown*, 102 F.3d 1390 (5th Cir. 1996), *overruled on other grounds*, 161 F.3d 256 (5th Cir. 1998) 14
United States v. *Calandra*, 414 U.S. 338 (1974) 26
United States v. *Drayton*, 536 U.S. 194 (2002) 22, 24
United States v. *Durant*, 730 F.2d 1180 (8th Cir. 1984) 14
United States v. *Erwin*, 875 F.2d 268 (10th Cir. 1989) 14
United States v. *Eylicio-Montoya*, 70 F.3d 1158 (10th Cir. 1995) 14
United States v. *Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998) 14
United States v. *Grant*, 349 F.3d 192 (5th Cir. 2003) 14
United States v. *Hensley*, 469 U.S. 221 (1985) 11, 18
United States v. *Hill*, 855 F.2d 664 (10th Cir. 1988) 14
United States v. *Jacobsen*, 466 U.S. 109, 113 (1984) 18, 19
United States v. *Kimball*, 25 F.3d 1 (1st Cir. 1994) 14
United States v. *Leon*, 468 U.S. 897 (1984) 27, 28
United States v. *Mendenhall*, 446 U.S. 544 (1980) 9, 10, 22
United States v. *Mosley*, 454 F.3d 249 (3d Cir. 2006) 14
United States v. *Powell*, 929 F.2d 1190 (7th Cir. 1991) 14
United States v. *Roberson*, 6 F.3d 1088 (5th Cir. 1993) 14
United States v. *Rusher*, 966 F.2d 868 (4th Cir. 1992) 14
United States v. *Sowers*, 136 F.3d 24 (1st Cir. 1998) 14

TABLE OF AUTHORITIES – continued

Page

United States v. *Souza*, 223 F.3d 1197 (10th Cir. 2000) 20
United States v. *Twilley*, 222 F.3d 1092 (9th Cir. 2000) 14
United States v. *Williams*, 589 F.2d 210 (5th Cir. 1979) 14
Weeks v. *United States*, 232 U.S. 383 (1914), *overruled on other grounds by Mapp* v. *Ohio*, 367 U.S. 643 (1961) 27
Whren v. *United States*, 517 U.S. 806 (1996) 11, 12, 17
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 25

CONSTITUTION AND STATUTES

U.S. Const. amend. IV 18
Cal. Health & Safety Code § 11377(a) 4
§ 11379(a) 4
§ 11379.6 4
Cal. Veh. Code § 4853 2

SCHOLARLY AUTHORITIES

Erica Flores, *"People, Not Places": The Fiction of Consent, the Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops*, 7 U. Pa. J. Const. L. 1071 (2005) 16
W.R. LaFave, *Search and Seizure* (4th ed. 2004) 15

OTHER AUTHORITIES

1 Crim. Prac. Manual (Feb. 2007) 16
Paul Coltoff et al., 79 C.J.S. *Searches* (Feb. 2007) 16
William E. Ringel, *Searches and Seizures, Arrests and Confessions* (Mar. 2007) 15

STATEMENT OF THE CASE

The simple question in this case is whether, for purposes of the Fourth Amendment, a police officer who seizes a car by means of a traffic stop also seizes any passengers who are also traveling in that car. The Court's precedents both indicate – and, indeed, analytically require – an answer in the affirmative. The vast weight of authority in both the federal and state courts to have considered the question directly have so held. This weight of authority stems from Fourth Amendment principles concerning the constraint of acknowledged liberty interests, the highly common-sense view that a passenger is unavoidably seized along with the car, and an implicit acknowledgement that reasonable passengers would not feel free to simply get out and walk away once an officer has pulled the car over.

The Court's precedents most directly on point concern the ability of police officers to control both drivers and passengers in the course of a traffic stop. These precedents are squarely based on concerns for officer safety and hold, over strong dissents, that a passenger's liberty interests are constrained in a traffic stop. When an officer is able to exert sufficient authority to order a passenger out of a car in the course of a traffic stop (or, by extension, to order someone who has gotten out of the car to get back in), it makes absolutely no sense to say for Fourth Amendment purposes that a passenger is not seized and therefore entirely free to either stay or leave. As a general rule, such persons are detained for the balance of the time necessary to resolve the reason for the stop or until they are excused by the officer.[1]

---

[1] There may also be circumstances in which a reasonable person would not feel free to leave even when that individual is informed by the officer that he or she is free to leave (*e.g.*, unsafe neighborhood, difficult roadway conditions). *See Amici* Brief in Support of Petitioner, the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders at 4-5, 14 (NACDL & NAFD Br.); *Amici* Brief in Support of Petitioner, the American Civil Liberties Union at 6

In this case the stop was made without any reasonable basis for suspicion. A Sheriff's Deputy stopped the vehicle in which Petitioner Bruce A. Brendlin was riding for an expired license plate, despite the acknowledged display of a valid temporary operating permit and the fact that the dispatcher had informed the Deputy, prior to the stop, that although the registration had expired, an application for renewal had been filed. RT 43 (JA 60). From this constitutionally invalid seizure inescapably followed Petitioner's identification by the Deputy, his arrest on the outstanding warrant (for failure to report to his parole supervisor), and his charge and conviction for methamphetamine production. The fruit of this paradigmatic poisonous tree warrants suppression and the California Supreme Court's decision should be vacated.

A. Factual Background

Yuba City, a part of Sutter County, is located about 40 miles north of Sacramento, California. On November 27, 2001, a Sutter County Deputy Sheriff and his cadet partner fell in behind a car in which Petitioner was riding in the front passenger seat. Earlier in the evening, the Deputy had seen the unoccupied car parked at a convenience store and noticed what appeared to be an expired registration sticker (reading "9" for September) on the license plate. However, he also spotted a red temporary operating permit from the California Department of Motor Vehicles prominently displayed in the rear window. RT 12-13 (JA 34-35). The temporary permit had the number eleven on it, indicating that it was valid through the month of November. The Deputy contacted his dispatcher who confirmed the expired registration, but also informed that an application was in process for renewal of the registration. RT 12-14, 42-44 (JA 34-36, 60-61). Under California law, this permits operation of the vehicle. See Cal. Veh. Code § 4853. The Deputy later testified that he saw nothing unusual or suspicious about the temporary permit and that its location was proper and prominent. RT 29-30 (JA 49).

Nonetheless, when he and his partner spotted the car again several hours later, the Deputy activated his lights and pulled the car over. As the Deputy later explained, he needed to verify that the temporary operating permit had in fact been issued for that automobile, despite the Dispatcher's earlier verification that a renewal application was in process for the license for that car. RT 42-44 (JA 60-61). After he stopped the car, the Deputy switched on his spotlight and approached the driver's side of the vehicle. The Deputy asked the driver to produce her license, which she did. At that point the Deputy recognized Petitioner as "one of the Brendlin brothers." RT 48 (JA 65). He asked petitioner to identify himself and Petitioner did so.[2] The Deputy suspected that either Petitioner or his brother was a parolee at large, so he contacted dispatch and eventually received word that Petitioner was wanted for a parole violation.[3] The Deputy then ordered Petitioner out of the car at gunpoint and placed him under arrest. A search incident to arrest turned up an orange syringe cap in Petitioner's shirt pocket and items related to methamphetamine manufacturing in the car. RT 12-19, 26-38, 43 (JA 34-40, 46-56).

---

[2] In its opinion, the California State Supreme Court asserts that "[i]n response to the deputy's inquiry, the defendant falsely identified himself as Bruce Brown." *People* v. *Brendlin*, 136 P.3d 845, 847 (Cal. 2006) (JA 115). This assertion plainly has its source in a typographical error in the suppression hearing transcript. RT 16 (JA 37). At the earlier preliminary hearing (to determine whether Petitioner and the driver should be held over on the charges), just 10 days after the arrest, the Deputy testified that Petitioner properly identified himself. Preliminary Hearing at 6 (Cal. Super. Ct. Dec. 7, 2001). On cross-examination at the suppression hearing, the Deputy again recited that Petitioner had properly identified himself. RT 38 (JA 56). Further, there is absolutely no mention in either transcript by the prosecutor of a purported misidentification.

[3] Petitioner's parole had been suspended and a warrant issued because he had failed to report to his parole supervisor as required. RT 56-58 (JA 72-74).

On December 21, 2001, the district attorney of Sutter County, California filed an information in Superior Court charging Petitioner and the driver[4] with manufacturing methamphetamine (Cal. Health & Safety Code § 11379.6)[5], transporting methamphetamine (*id.* § 11379(a)), and possessing methamphetamine (*id.* § 11377(a)) on November 27, 2001. Information at 1 (Cal. Super. Ct. Dec. 21, 2001).

Petitioner moved to suppress the evidence obtained in the search of his person and the search of the car as the fruits of a unconstitutional seizure because the Deputy had no reasonable suspicion to justify the initial traffic stop. At a hearing on February 8, 2002, the Superior Court denied that motion, finding that the traffic stop was not unreasonable on the basis of the Deputy's explanation that he needed to check the temporary permit despite its conceded visibility and the fact that his dispatcher had confirmed that the renewal was in process. RT 42-43 (JA 60-61). Further, the Court found that Petitioner was not detained by virtue of the traffic stop because he was free to leave once the car stopped moving. On this basis, the Court further held that Mr. Brendlin lacked "standing" to bring a motion to suppress the items found in the car. RT 70 (JA 85).

Petitioner pled guilty on February 11, 2002 to a violation of California Health and Safety Code section 11379.6, subdivision (a) (manufacturing methamphetamine), and admitted in an amended allegation that he had served a prior prison term within the meaning of California Penal Code section 667.5, subdivision (b). The District Attorney moved to dismiss the remaining counts and allegations, and the parties agreed that Petitioner would serve a term of four years in state prison, concurrent to any additional sentence later

---

[4] The driver was not a party to the appeal.

[5] All references to the Health and Safety Code, the Vehicle Code, or the Penal Code are to the code of the State of California unless otherwise specified.

imposed for Petitioner's failure to submit to parole supervision. Mr. Brendlin was sentenced in accordance with the plea agreement that same day. Clerk's Docket and Minutes (Cal. Super. Ct. Nov. 29, 2001) (JA 1).

Petitioner filed timely notice of appeal under Penal Code section 1538.5, subdivision (m). On January 27, 2004, the Court of Appeal of the State of California, Third Appellate District, issued an opinion reversing the denial of Petitioner's motion to suppress. *People* v. *Brendlin*, 8 Cal. Rptr. 3d 882 (Cal. Ct. App. 2004) (JA 102-111). The Third Appellate District held that Mr. Brendlin was entitled to challenge the legality of the traffic stop, that the stop was undertaken without reasonable suspicion, and that the evidence seized from Mr. Brendlin's person and from the car should have been suppressed as fruits of the illegal traffic stop. *Id.* (JA 102-111). The state sought review.

B. California Supreme Court Decision

A narrow majority of the California Supreme Court reversed. *People* v. *Brendlin*, 136 P.3d 845 (Cal. 2006) (JA 114-140). During the proceedings, the Attorney General's Office conceded that there was no reasonable suspicion for the traffic stop. *Id.* at 848 (JA 118-119). Nonetheless, the Court held that Petitioner had never been "seized" for purposes of the Fourth Amendment. The opinion offers its own – and novel – three-part test to determine whether or not a "seizure" has taken place:

> A seizure occurs when [1] the police, by the application of physical force or show of authority, seek to restrain the person's liberty; [2] the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter; and [3] the person actually submitted to that authority for reasons not "independent" of the official show of authority.

Id. at 851 (JA 124) (internal citations omitted). Applying its three-part test, the majority first found the that Officer intended his show of authority to affect only the driver because the deputy directed his flashing lights "at the driver . . . and not the defendant." *Id.* (JA 125). The majority declared that, as a general matter "'[a]n officer causing a vehicle to pull over in transit is conducting an investigatory stop of the *driver*.'" *Id.* (JA 125) (alteration in original). The majority further offered that even if the Petitioner had been the *subject* of the deputy's show of authority, Petitioner, "as the passenger, had no ability to submit to the deputy's show of authority." *Id.* at 852 (JA 125).

The majority also held that Petitioner did not meet the second prong of its test because, notwithstanding being pulled over to the side of the road by a police officer, a reasonable person in Petitioner's position would have felt perfectly free to exit the car and walk away. See *id.* (JA 126). As for the third prong, the majority found that the incidental physical restraint – *i.e.*, the fact that "it is unsafe for the passenger to exit a moving vehicle" – is inapposite in the Fourth Amendment context. The majority likened this to what it described as the situation "in most cases," where passengers simply choose to stay in the car during traffic stops because they "prefer to await the completion of the traffic stop and continue en route in the company of the driver." *Id.* (JA 126).

In a vigorous dissent joined by two other justices, Justice Corrigan argued that "[p]assengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense." *Id.* at 855 (JA 133). Apart from obviously being "deprived of further freedom of movement," the dissent noted that once a vehicle has been pulled over, "based on the need to protect the officer's safety," under California and United States Supreme Court case law, "the officer has the authority, as a matter of law, to order that the passengers remain inside or get out of the vehicle." *Id.* (JA 133) (citing *Maryland* v. *Wilson*, 519 U.S. 408 (1997), and

People v. *Castellon*, 91 Cal. Rptr. 204 (Cal. Ct. App. 1999)). Thus, "[b]y stopping the vehicle, the officer has exerted authority over everyone in it." *Id.* at 857 (JA 136).

SUMMARY OF THE ARGUMENT

A traffic stop plainly interferes with the "freedom of movement" of *all* occupants in a vehicle and thereby deprives the passenger, as well as the driver, of recognized liberty, property and privacy rights. While this Court has not expressly held that a passenger is seized during a traffic stop, the Court has addressed the ability of police officers to control both drivers and passengers in the course of such actions. These precedents are squarely grounded in concerns for officer safety and hold, over strong dissents, that a passenger's liberty interests are constrained in these situations. When an officer is able to exert sufficient authority to order a passenger out of a car in the course of a traffic stop (or, by extension, to order someone who has gotten out of the car to get back in), it makes absolutely no sense to say for Fourth Amendment purposes that a passenger is not seized and therefore entirely free to either stay or leave. Plainly, such persons are detained for the balance of the time necessary to resolve the reason for the stop or until they are excused by the officer.

Indeed, an overwhelming majority of courts – both federal and state – that have considered this issue have held that a police officer who seizes a car by means of a traffic stop also seizes its passengers. The handful of state courts that have held otherwise have inappropriately focused in large part on the subjective intent of the officer in conducting the traffic stop, an element clearly rejected by this Court. Moreover, this Court has also dismissed the argument advanced by these state courts that a passenger, unlike the driver of a car that has been seized, would simply feel free to leave once the car has rolled to a stop.

The decisions from this Court relied upon by the California Supreme Court are factually distinguishable and their underlying principles do not apply to this case. First, none of the primary cases cited for support by the court below involve traffic stops. Second, the California Supreme Court attempts to analogize to cases involving the inapposite circumstance where the conduct on the part of the individual subject to the alleged seizure may be viewed as consensual. Unlike a situation where a police officer conducts a consensual search upon boarding an already stationary bus or approaching an individual in an airport lobby, a traffic stop unquestionably involves the wholly distinct action of effecting a forcible physical restraint of an individual's "freedom of action."

Finally, public policy and the purpose underlying the Fourth Amendment and its attendant exclusionary rule strongly suggest that the fruits of this admittedly unlawful traffic stop should be excluded. By permitting passengers to move to suppress the fruits of unreasonable traffic stops, this Court would both protect individual privacy interests against unlawful police intrusion and deter future unlawful police conduct. Furthermore, failing to allow such suppression would lead to anomalous results, such as permitting the admission of evidence against passengers but not drivers in the same vehicle under the identical circumstances.

ARGUMENT

I. THE UNREASONABLE STOP CONSTRAINED PETITIONER'S LIBERTY AND PRIVACY INTERESTS AND HE WAS THEREBY SEIZED FOR FOURTH AMENDMENT PURPOSES.

Although the practical question before this Court concerns Petitioner's entitlement to move to suppress the evidence seized as a result of the unlawful traffic stop, the more fundamental issue posed by this case concerns personal liberty and the freedom to move about without unreasonable interference by police. As this Court noted in *United States* v.

Brignoni-Ponce, "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person, and the Fourth Amendment requires that the seizure be 'reasonable.'" 422 U.S. 873, 878 (1975) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968)). In turn, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Id.* This Court has asserted that in drawing this balance, the Court must "assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). For "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States* v. *Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

The appropriate inquiry, then, is first whether the challenged search or detention has infringed an interest of the defendant's which the Fourth Amendment was designed to protect. In simple terms, the issue in this case is whether Petitioner, as a passenger in a moving car on a public roadway, had a Fourth Amendment interest in continuing on his journey without unreasonable police interference. Assuming this question is answered in the affirmative, the second question is whether, when the driver of the car in which Petitioner was traveling submitted to the police show of authority and brought the car to a halt, Petitioner was thereby detained.

The answer to each question is straightforward.

A. A Passenger's Fourth Amendment Rights Are Well Established.

A passenger traveling in a car on a public highway has a well-established liberty interest in continuing on that journey without unreasonable interference by law enforcement. The Court has repeatedly held that individuals have a liberty interest in their freedom of movement, *e.g.*, *Mendenhall*, 446 U.S. at 553-54, and "the right to personal security free from arbitrary interference by law officers." *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam). As this Court observed in *Delaware* v. *Prouse*, the Fourth and Fourteenth Amendments afford both drivers and passengers the right to be free of even the briefest of unreasonable automobile stops. 440 U.S. 648, 653 (1979). Even though motorists travel on public roadways and are licensed as a state privilege, they nonetheless have the right to freedom from capricious and unreasonable stops in the process, and this Court has recognized that passengers enjoy similar rights. *Id.*

Specifically, the Court has acknowledged that traffic stops "interfere with freedom of movement, are inconvenient, and consume time," and may create anxiety in both drivers and passengers. *Id.* at 657. The Court has also noted that travel by automobile "is a basic, pervasive, and often necessary mode of transportation." *Id.* at 662. Accordingly, the Court has recognized the right of automobile passengers to be free of having "their travel and privacy interfered with at the unbridled discretion of police officers." *Id.* at 663.[6]

---

[6] Concern about interference with an individual's "freedom of movement" has appeared in a variety of Fourth Amendment seizure contexts. For example, in *Brower* v. *County of Inyo*, this Court held that the successful use of a roadblock to stop the driver of a stolen vehicle constituted a seizure under the Fourth Amendment. 489 U.S. 593, 596 (1989). The suspect in *Brower* did not voluntarily stop his car in response to the police roadblock, but instead was killed when his vehicle crashed into the roadblock. *Id.* at 594. This Court rejected the argument that the ultimate restriction of Brower's freedom of movement was the result of

In short, the liberty and privacy interests that both motorists and passengers have are both well-established and well-recognized. Indeed, the Court has recognized that the liberty interest of passengers "is in one sense stronger than that for the driver" because of the driver's responsibilities to obey the law. *Maryland* v. *Wilson*, 519 U.S. 408, 413 (1997).

B. Passengers Are Seized Within The Meaning Of The Fourth Amendment When Authorities Stop The Car.

This Court has never directly confronted the second – and core – question of whether passengers are also seized during a traffic stop. The Court has, however, consistently held that a police detention of a moving vehicle generally results in a seizure of its occupants, no matter how brief the duration of the stop. For example, in *Whren* v. *United States*, 517 U.S. 806, 809-10 (1996), the Court stated that temporary detention of individuals during the stop of an automobile, even briefly and for a limited purpose, is a seizure under the Fourth Amendment. See also *United States* v. *Hensley*, 469 U.S. 221, 226 (1985) ("[S]topping a car and detaining its occupants constitute[s] a seizure within the meaning of the Fourth Amendment."). The Court reached a similar conclusion in *Berkemer* v. *McCarty*, noting that "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle." 468 U.S. 420, 436 (1984).

Although the particular question of whether a passenger is seized for Fourth Amendment purposes by virtue of a traffic stop is not one that this Court has confronted directly before now, the Court has on several occasions heard passenger challenges to the reasonableness of automobile stops. See,

---

his independent decision to continue his flight, instead holding that a seizure occurs whenever "there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 597 (emphasis omitted).

e.g., *Whren*, 517 U.S. at 808-10; *Prouse*, 440 U.S. 648. Moreover, the Court has operated under the assumption that a passenger of an automobile subject to a traffic stop is "seized" for Fourth Amendment purposes to decide a number of cases addressing the scope of authority that officers have over passengers during traffic stops. In *Maryland* v. *Wilson*, this Court extended to passengers the ruling of *Pennsylvania* v. *Mimms*, in which the Court held that an officer conducting a lawful traffic stop could order a driver out of the car even where the officer had no particularized suspicion that the driver posed a threat to officer safety. *Wilson*, 519 U.S. at 413-14. The Court in *Mimms* described as "*de minimis*" this additional intrusion on the driver's liberty, since the driver was already lawfully detained due to the traffic stop itself. *Mimms*, 434 U.S. at 111.

The *Wilson* opinion also noted that "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." 519 U.S. at 414. Thus, just as in *Mimms*, the order that a passenger spend his or her temporary detention outside rather than inside the vehicle is at best a *de minimis additional* intrusion on the passenger's liberty. The majority opinion in *Wilson* necessarily acknowledged that a passenger is detained as soon as the driver submits to the officer's show of authority by stopping the vehicle. If the passenger were not detained at all, it is difficult to imagine how, in the absence of any particularized suspicion, an order that a passenger exit a vehicle or get back in it if he did exit could be constitutionally justified. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 695, 703 (1981) (in executing a warrant to search a house for narcotics, police could order someone leaving the house to go back inside, because such a detention constitutes "only an incremental intrusion on personal liberty").

The presumption that a passenger remains detained when the car comes to a halt was fundamental to the *Wilson* holding, and found considerable support in this Court's decision in *Delaware* v. *Prouse*. In that case, the defendant

was a passenger in a vehicle that was pulled over at random by a police officer. The officer had "observed neither traffic or equipment violations nor any suspicious activity, and [he admitted] that he made the stop only [] to check the driver's license and registration." *Prouse*, 440 U.S. at 650. Upon approaching the vehicle, the officer smelled marijuana smoke and subsequently saw contraband in plain view on the car's floor.

The Court held that the Fourth and Fourteenth Amendments were implicated in this instance, "because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Id.* at 653. Here, the California Supreme Court attempted to sidestep the import of this language in *Prouse* by making the inapposite assertion that the Delaware Supreme Court's opinion erroneously identified the defendant as the "operator" of the vehicle. See *Brendlin*, 136 P.3d at 850 (JA 122). This was of no moment, however, as this Court specifically corrected the Delaware Supreme Court's mistake, and still found constitutional violations even though the defendant-respondent merely "occupied" the vehicle, and was likely even in the back seat at the time it was pulled over. See *Prouse*, 440 U.S. at 650 n.1.

Indeed, throughout the Court's analysis in *Prouse*, it observed that Fourth and Fourteenth Amendment protections cover drivers and passengers alike. For example, the Court noted that "[a]n individual operating *or traveling* in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Id.* at 662 (emphasis added). In addition, it asserted that "the security guaranteed by the Fourth Amendment would be seriously circumscribed" were individuals "subject to unfettered governmental intrusion every time [they] entered a vehicle." *Id.* at 662-63.

C. The Vast Majority Of The Courts To Have Considered These Questions Have Found That A Traffic Stop Constitutes A Seizure Of All Occupants Of The Seized Vehicle.

A holding that a passenger is seized by a traffic stop would be far from revolutionary; to the contrary, it represents the nearly unanimous view of both state and federal courts. Every one of the federal circuit courts of appeals to have considered the issue has found that a passenger may challenge a traffic stop under circumstances similar to those in this case. See, *e.g.*, *United States* v. *Mosley*, 454 F.3d 249 (3d Cir. 2006); *United States* v. *Grant*, 349 F.3d 192 (5th Cir. 2003); *United States* v. *Ameling*, 328 F.3d 443 (8th Cir. 2003); *United States* v. *Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States* v. *Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998); *United States* v. *Sowers*, 136 F.3d 24 (1st Cir. 1998); *United States* v. *Brown*, 102 F.3d 1390 (5th Cir. 1996), *overruled on other grounds*, 161 F.3d 256 (5th Cir. 1998); *United States* v. *Eylicio-Montoya*, 70 F.3d 1158, 1164 (10th Cir. 1995); *United States* v. *Kimball*, 25 F.3d 1, 5 (1st Cir. 1994); *United States* v. *Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993); *United States* v. *Rusher*, 966 F.2d 868 (4th Cir. 1992); *United States* v. *Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991); *United States* v. *Erwin*, 875 F.2d 268, 270-71 (10th Cir. 1989); *United States* v. *Durant*, 730 F.2d 1180 (8th Cir. 1984); *United States* v. *Williams*, 589 F.2d 210, 214 (5th Cir. 1979); see also *United States* v. *Hill*, 855 F.2d 664, 666 (10th Cir. 1988) (passenger on boat boarded by police without warrant "clearly may challenge the validity of his own arrest . . . . [and] may therefore claim that evidence found as a fruit of the arrest should be excluded").

The vast majority of states to pass on the issue have likewise held that passengers are seized in a traffic stop and may challenge both the legality of the stop and the admissibility of evidence obtained therefrom. See, *e.g.*, *People* v. *Bunch*, 764 N.E.2d 1189, 1193 (Ill. App. Ct. 2002);

State v. *Gomez*, 6 P.3d 765, 766 (Ariz. Ct. App. 2000); *State* v. *Bowers*, 976 S.W.2d 379, 381 (Ark. 1998); *State* v. *Harris*, 557 N.W.2d 245 (Wis. 1996); *State* v. *Carter*, 630 N.E.2d 355, 360-61 (Ohio 1994); *State* v. *Wilson*, 867 P.2d 1175, 1179 (N.M. 1994); *State* v. *Higgins*, 884 P.2d 1242, 1244 (Utah 1994); *Howard* v. *State*, 888 S.W.2d 166, 172 (Tex. Crim. App. 1994); *State* v. *Stott*, 503 N.W.2d 822, 828 (Neb. 1993), *overruled on other grounds*, *State* v. *Johnson*, 589 N.W.2d 108 (Neb. 1999); *State* v. *Krebs*, 504 N.W.2d 580 (S.D. 1993); *McKnight* v. *State*, 612 N.E.2d 586, 588 (Ind. Ct. App. 1993); *Ott* v. *State*, 600 A.2d 111 (Md. 1992); *State* v. *Creech*, 806 P.2d 1080, 1082 (N.M. Ct. App. 1991); *State* v. *Harms*, 449 N.W.2d 1, 4 (Neb. 1989); *State* v. *Epperson*, 703 P.2d 761, 770-71 (Kan. 1985); *State* v. *Haworth*, 679 P.2d 1123, 1123-24 (Idaho 1984); *State* v. *Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *People* v. *Lagrone*, 464 N.E.2d 712, 714 (Ill. App. Ct. 1984); *People* v. *Kunath*, 425 N.E.2d 486, 489-90 (Ill. App. Ct. 1981); *State* v. *DeMasi*, 419 A.2d 285, 294-95 (R.I. 1980), *vacated on other grounds*, 452 U.S. 934 (1981). By far the prevailing view in the United States, then, is that a passenger is seized by virtue of a traffic stop, and in the event that such a stop is unreasonable, the passenger may move to suppress the fruits of that seizure.

Prominent commentators also support Petitioner's position. "If either the stopping of the car [or] the length of the passenger's detention thereafter . . . are unreasonable from a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car." W.R. LaFave, *Search and Seizure* § 11.3 (4th ed. 2004); William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 11:20 (Mar. 2007) (Passengers "are not foreclosed from challenging the stop of the vehicle, since such a stop encompasses a personal seizure . . . [in *Rakas*,] the Court ruled only on right to contest the search. If the stop had been challenged and found illegal, the subsequent search and any

evidence uncovered through it would have been tainted and suppressed as illegal fruit."). "A passenger has standing to challenge the stop, as opposed to the search, of the vehicle in which he or she is riding." Paul Coltoff et al., 79 C.J.S. *Searches* § 103 (Feb. 2007). "Even absent ownership or possession of the vehicle, a passenger has standing to challenge a stop, seizure, or arrest to the extent it violates his own Fourth Amendment rights." 1 Crim. Prac. Manual § 23:10 (Feb. 2007). See also Erica Flores, *"People, Not Places": The Fiction of Consent, The Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops*, 7 U. Pa. J. Const. L. 1071, 1079 (2005) ("[P]assengers are subjected to a seizure as soon as the car is pulled over. Whether that seizure may be described as incidental is irrelevant. Passengers are forced to yield to police authority when the driver does.").

The California Supreme Court acknowledged that only two other Courts have taken the position that a passenger in a car subject to a traffic stop is not seized under the Fourth Amendment. *Brendlin*, 136 P.3d at 849 (JA 120) (citing *People* v. *Jackson*, 39 P.3d 1174 (Colo. 2002) and *State* v. *Mendez*, 970 P.2d 722 (Wash. 1999)); see also *Jarvis* v. *State*, 600 A.2d 38, 41 n.1 (Del. Super. Ct.) (passenger has no "standing" to challenge stop of vehicle but may challenge subsequent detention of her person), *aff'd sub nom. Mitchell* v. *State*, 604 A.2d 418 (Del. 1991).

The Colorado Supreme Court concluded in *Jackson* that a passenger is not detained by a traffic stop because "a traffic stop is an investigatory stop of the driver; the display of authority and control is directed at the driver, not the passenger." *Jackson*, 39 P.3d at 1185. The Washington Supreme Court employed similar reasoning in *Mendez*, where the court asserted that "the privacy rights of passengers . . . are not diminished by the [automobile] stop" because there is only "probable cause to believe that the driver has committed" the offense targeted by the police. *Mendez*, 970

P.2d at 729. In addition, both courts found – *Jackson* explicitly and *Mendez* implicitly – that because the show of authority during a traffic stop is directed at the driver, a reasonable passenger would feel free to leave or to terminate the encounter. *Jackson*, 39 P.3d at 1186; *Mendez*, 970 P.2d at 729.

Like the California Supreme Court below, see *Brendlin*, 136 P.3d at 851 (JA 125), both the Colorado and Washington Courts incorrectly focus on the officer's subjective intent in the analysis of whether a passenger has been detained. The question of whether the driver or the passenger is the focus of the officer's investigation is of no importance to the issue of whether the passenger is detained, as this Court expressly rejected such a requirement when it rejected the "target of the investigation" approach in *Rakas* v. *Illinois*, 439 U.S. 128, 132-34. Moreover, this Court has consistently held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

In fact, as Petitioner's *Amici* observe, authorities can and do stop vehicles for passenger behavior and passengers may be separately cited. NACDL & NAFD Br. at 15 & n.9. This Court has also previously noted that the convenient parsing of an officer's intention necessarily injects an inappropriately subjective component into that court's test for what constitutes a seizure. See *Whren*, 517 U.S. at 813. But even if none of this were enough, the California Supreme Court ignored the Court's express language in *Brower* v. *County of Inyo* that "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking" so long as the officer's actions in effecting the detention or taking itself were wilful. 489 U.S. 593, 596 (1989) (internal citations omitted). An officer conducting a traffic stop must reasonably and, as a matter of caution, expect that passengers could be present and will be necessarily detained by the stop, whether or not those passengers are the subject of the police investigation.

Thus, there can be no question that Petitioner was detained by the traffic stop even if the officer's suspicions were focused on the driver. The officer intended to seize the vehicle and its occupants, he took steps to effect that seizure by activating his overhead lights, and the driver did in fact submit to the officer's show of authority. Through "means intentionally applied," the officer halted Petitioner's freedom of movement.

The state courts' further suggestion that a passenger subject to a traffic stop would "feel free to leave" is also without merit. This Court has unequivocally asserted that "few motorists" (*i.e.*, "the driver and the passengers") "would feel free . . . to leave the scene of a traffic stop without being told they might do so." *Berkemer*, 468 U.S. at 436. Furthermore, given this Court's holding in *Wilson* that an officer may order a passenger out of the car during a traffic stop as a matter of course, *with no additional suspicion of wrongdoing*, this conclusion regarding what a reasonable passenger would believe appears to be untenable at best. See *Wilson*, 519 U.S. at 410.

It appears that the misstep made by the California, Colorado, and Washington Supreme Courts stems from their confusion over the appropriate analytical framework to apply. The Fourth Amendment limits the government's power to control "persons, houses, papers, and effects." U.S. Const. amend. IV; see *Hensley*, 469 U.S. at 226. A Fourth Amendment seizure occurs when a person, house, paper or effect is controlled by government action. This Court has identified two different tests for what constitutes a "seizure." When the government seeks to control "houses, papers, and effects," the Court ordinarily applies the test that a seizure occurs "when there is some meaningful interference with an individual's possessory interests." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). When the government seeks to control persons, the Court determines that a seizure has occurred when a law enforcement agent, "by means of

physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968).

These two tests reflect the different ways that police ordinarily control persons as compared how police ordinarily control houses, papers, and effects. When officers enter a suspect's home and take away his papers, those papers are taken by direct force. Officers pick up the papers and remove them, and the government's control interferes directly with the individual's possessory interest. *Jacobsen*, 466 U.S. at 113-14. In contrast, government control over a person is often less direct. In some cases, the police may exert direct physical control over the person, such as by placing him in handcuffs. In many cases, however, the police exert control by threat. If an officer points a gun at a suspect and orders him to "freeze!," the person is seized when he complies with the officer's order. See *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991). The moment that a reasonable person would not feel free to leave and does not leave is the moment that the officer controls the person. In sum, both tests for when a seizure occurs pinpoint the same moment in two different contexts. In both contexts, a seizure occurs when the government takes control of the person, house, paper, or effect.

Whether a traffic stop seizes a passenger has divided these state courts because it involves control over a person in a context more typical of control of paper and effects. When an officer pulls over a car, he directs his authority at the driver because the driver has initial control of the vehicle. The passenger is simply along for the ride. This creates confusion under the usual test for seizing a person – whether a reasonable person would feel free to leave – because the officer is causing a seizure by threat not actually directed at the passenger. However, the uncertainty is readily resolved by recognizing the purpose of both tests for seizures: both tests identify the moment of control. A passenger in a seized

car is controlled just like the contents of a seized package; when government action takes control of "effects," it seizes those effects as well as any person who happens to be located inside. When an officer pulls over a vehicle, he does not simply control the driver: he controls the entire vehicle and all of its contents. All are seized under the Fourth Amendment.

The California Supreme Court also mistakenly concluded that Brendlin was not seized because he was merely acted upon by the driver of the vehicle. *Brendlin*, 136 P.3d at 851 (JA 124-125). Under this theory, the officer acted on the driver, and the driver separately acted on Brendlin. This artificial bifurcation is based on a misunderstanding of the line between state actors and private actors under the Fourth Amendment. When a private party acts as an instrument or agent of the govern-ment, that private party becomes a state actor for Fourth Amendment purposes. *Skinner* v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614-15 (1989). The Fourth Amendment clearly applies when the government commandeers a private actor and orders that actor to commit a search or seizure. For example, if an officer orders a UPS driver to pull over so he can inspect a package in the driver's UPS truck, the contents of the package are seized when the driver complies. *United States* v. *Souza*, 223 F.3d 1197, 1201-02 (10th Cir. 2000). The officer's command has transformed the UPS driver into a state actor for Fourth Amendment purposes, and the govern-ment's interruption of the steam of delivery constitutes a seizure. *Id.*; see also *Corngold* v. *United States*, 367 F.2d 1, 13 (9th Cir. 1966). The same principle applies when a police officer orders a driver to pull over in a routine traffic stop. The officer has commandeered the driver, and thus the driver's conduct may be attributed to the government. Just like the package in the UPS truck, the passenger in the vehicle is seized.

II. THE CASE LAW FROM THIS COURT RELIED UPON BY THE CALIFORNIA SUPREME COURT IS IN APPOSITE.

In concluding that a passenger subjected to a traffic stop is not seized for purposes of the Fourth Amendment, the California Supreme Court dismissed the overwhelming weight of authority and this Court's strong indications to the contrary. Instead, it extrapolated from this Court's holdings in *California* v. *Hodari D.*, 499 U.S. 621 (1991), and *Florida* v. *Bostick*, 501 U.S. 429, 431 (1991), a rigid checklist of conditions that must be met before a seizure can be deemed to have occurred. *Brendlin*, 136 P.3d at 851 (JA 124). The test that emerges from the California court's review of this Court's precedents focuses on factors that are simply not applicable to a traffic stop or consistent with this Court's general aversion to subjective intent tests in the Fourth Amendment context.

In *Hodari D.*, this Court held that a seizure requires *either* submission to a show of authority *or* physical restraint by police. *Hodari D.*, 499 U.S. at 626. A traffic stop of a car containing multiple occupants satisfies both conditions. When the police stop a car or truck, the passenger is subject to both the authority the police are asserting and the physical restraint resulting from that assertion of authority. When the driver of a moving vehicle submits to police authority and brings that vehicle to a stop, the car and its occupants are thereby legally seized. Cf. *Prouse*, 440 U.S. at 653.

Although the question of what constitutes a seizure for purposes of the Fourth Amendment can lead to a detailed factual analysis of the totality of the circumstances (see, *e.g.*, *Bostick*, 501 U.S. at 431), this case involves intentional and successful police interference with Petitioner's freedom of movement, and is not a close case in which the contact between Petitioner and the deputy could arguably have been deemed consensual. At the moment that a driver submits to an officer's show of authority and stops his car, the passenger

has no more ability to terminate the encounter and go about his business than does a fleeing motorist who runs into a police barricade. Cf. *Brower*, 489 U.S. at 597. The seizure is complete when the person's freedom of movement has been curtailed. *Terry*, 392 U.S. at 16.

Under starkly different circumstances, this Court has held that the test to determine whether a police contact is consensual in nature depends on whether, in view of the totality of the circumstances, a reasonable person would have believed himself free to disregard the police and go about his business, leave the scene, or otherwise terminate the encounter. *Bostick*, 501 U.S. at 434; *Mendenhall*, 446 U.S. at 554. To date, that test has been applied only in situations in which police action did not interfere with the individual's freedom of movement. When an officer approaches an individual on the street or even in a more controlled environment such as an airport, simple questioning will not transform the encounter into a seizure unless the circumstances are such that a reasonable person would not feel free to walk away. *Mendenhall*, 446 U.S. at 555. Only where police action actively impedes the person's ability to terminate the police contact and go about his business will the encounter be deemed a seizure under the Fourth Amendment. See *Florida* v. *Royer*, 460 U.S. 491 (1983). Likewise, when police approach a person on a bus making a scheduled stop, the person is not detained simply because police question him and ask for consent to search his belongings; the encounter will not constitute a detention unless the conduct of the officers would lead a reasonable person to believe that he is not free to terminate the encounter. *Bostick*, 501 U.S. at 434; *United States* v. *Drayton*, 536 U.S. 194 (2002).

In *Bostick*, this Court addressed the distinction between officer conduct that interferes with freedom of movement, and conduct that is merely coercive without actively impeding a suspect's freedom to walk away from the encounter:

> When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Bostick, 501 U.S. at 435-36. The Court went on to point out that Bostick, as a passenger seated on a bus that was scheduled to depart, had no plans to leave the bus regardless of the officers' presence: "Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Id.* at 436.

Here, the California Supreme Court relied on this language from *Bostick* for the proposition that the interference with the individual's liberty interests must not be the result of some force independent of police conduct, specifically the passenger's decision to ride in an automobile. *Brendlin*, 136 P.3d at 852 (JA 126). *Bostick*, however, did not present a situation in which the individual's "freedom of action" had been curtailed in the first place. The passenger in *Bostick* was not on a bus that the officer had pulled over. Instead, his journey had not yet begun and he was sitting on a bus that was scheduled to leave the station; the officer's actions in that case did not impede the passenger's movement in any way because there had not yet been any such movement. *Bostick*, 501 U.S. at 435-36. By contrast, Petitioner's liberty interest in continuing his planned journey was impeded from the moment the car came to a stop. Unlike the passengers in *Bostick* and *Drayton*, Petitioner does not challenge his confinement in a vehicle that was not in motion. And unlike the officers in *Bostick* and *Drayton* who were lawfully on the bus to question passengers, the stop made by the Deputy here was unreasonable and undertaken with no lawful basis upon

which to question the driver and Petitioner in the first instance. Thus, Petitioner challenges the officer's actions on the ground that the encounter should never have happened, and his argument concerns neither the impracticalities of his leaving nor the supposed consensual nature of the interaction or the practical occurrence that was entirely dependent upon the driver's submission to coercive police conduct.

Bostick, *Mendenhall*, *Royer*, and *Drayton* all involve a similar type of interaction between police and citizens: in each case, the police action is limited to questioning without more coercive conduct. The distinction between the *Bostick* and *Mendenhall* line of cases and the instant case is that in the former scenario, police have not intentionally impeded the person's freedom of movement. In other words, the inquiry addresses whether an otherwise consensual encounter that does not interfere with a suspect's movement or freedom of action is accompanied by police conduct so coercive as to transform the event into a seizure. See *Drayton*, 536 U.S. at 204. By contrast, where an officer, either by force or by a successful assertion of authority, has deliberately impeded an individual's freedom of movement, this Court has consistently held that the individual has been detained for purposes of the Fourth Amendment. See *Brower*, 489 U.S. at 597.

III. A PASSENGER'S DETENTION LOGICALLY ENDS WHEN THE AUTHORITY RESPONSIBLE FOR THE STOP GIVES PERMISSION OR WHEN THE STOP ITSELF CONCLUDES.

Although the inquiry undertaken by *Bostick* and *Mendenhall* regarding whether a reasonable person would feel free to terminate the encounter and go about his business is inapposite to the question of whether a passenger is detained by the initial stop of a car in response to an officer's lights and sirens, it is relevant to the related question of when such a detention comes to an end. The California Supreme Court concluded that a passenger is free to leave once the

vehicle comes to a stop, absent particularized suspicion permitting the officer to order the passenger to remain in the car. *Brendlin*, 136 P.3d at 853-54 (JA 127-130). This Court's holdings, however, do not support such a conclusion.

This Court's decisions, particularly the decision in *Maryland* v. *Wilson*, have consistently demonstrated that a passenger's Fourth Amendment interests are implicated from the inception of a traffic stop, and that the limitations on the passenger's liberty continue for the duration of the stop, or at least until the officer indicates that the passenger is free to go. As already discussed, the Court in *Wilson* balanced the "de minimis" intrusion of ordering a passenger out of the vehicle during a traffic stop against the overriding concern for officer safety. The Court concluded that under the circumstances, the order constituted only a minimal change in circumstances because the passenger had already been stopped, and thus such an order only altered the location in which the passenger would await the completion of the stop. *Wilson*, 519 U.S. at 414.

In *Wyoming* v. *Houghton*, 526 U.S. 295 (1999), this Court held that a police officer with probable cause to conduct a warrantless search of the interior of a car could also search the personal belongings of a passenger if those belongings are capable of concealing contraband. The Court's holding appeared to rest on the notion that the car and its contents, including passengers and their belongings, were seized during the stop and subsequent investigation and search: "A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband in the car." *Id.* at 302. And in *Maryland* v. *Pringle*, 540 U.S. 366 (2003), a unanimous Court extended the holding in *Wyoming* v. *Houghton* to permit the warrantless arrest of a passenger for possession of items found in a car during a routine traffic stop, where the passengers and the driver denied possession of the

contraband. In finding that the officer could reasonably infer that all three men were jointly engaged in criminal activity simply because all three occupied the same car that contained the contraband, the Court relied on the *Houghton* Court's observation that an auto passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Pringle*, 540 U.S. at 373 (quoting *Houghton*, 526 U.S. at 304-05).

This exposure on the part of passengers would suggest strongly that the law does not treat passengers as appreciably different than drivers when a stop is affected. *Wilson*, *Houghton*, and *Pringle* thus underscore the limitations on a passenger's liberty that begin when the officer makes the traffic stop and continue until the investigation has concluded, or until the officer makes it clear that the passenger is free to go.

IV. THE UNREASONABLENESS OF THE STOP HERE WARRANTS SUPPRESSION OF THE EVIDENCE AGAINST PETITIONER.

Finally, public policy and the purposes of both the Fourth Amendment and its attendant exclusionary rule counsel in favor of excluding the evidence in this case. Permitting a passenger to move to suppress the fruits of an unreasonable traffic stop furthers the aims of the Fourth Amendment – to protect privacy interests against unlawful police intrusion – and is consistent with the purpose of the exclusionary rule – to deter future unlawful police conduct. *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

"[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596 (internal citation omitted). Petitioner seeks to suppress evidence that was obtained through deliberate police action which, as the State concedes,

constituted "misuse of power." This is entirely consistent with the purpose of the Fourth Amendment's Search and Seizure Clause, which was specifically designed to restrain government intrusions against individuals. *Weeks* v. *United States*, 232 U.S. 383, 391-92 (1914) ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law."), *overruled on other grounds by Mapp* v. *Ohio*, 367 U.S. 643 (1961). It is long established by this Court that the purpose of the Search and Seizure Clause requires that evidence obtained in violation of the Clause be suppressed. This is because "a ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry*, 392 U.S. at 13.

The exclusionary rule therefore is "designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995); see also *United States* v. *Leon*, 468 U.S. 897, 906 (1984). Since its announcement forty years ago in *Mapp* v. *Ohio*, 367 U.S 643 (1961), that the rule was binding on the states as part of the Fourteenth Amendment's due process guarantee, this Court has looked closely at the rule's "deterrent effect" in various contexts in determining how broadly the rule should be applied. See *Leon*, 468 U.S. at 906-13. The Court has concluded that unlawfully seized evidence should be excluded only when that exclusion is likely to have a significant effect in deterring the police from acting in a manner which they know or reasonably believe to be unlawful. *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S 357, 362-63 (1998). Specifically, the rule applies when it will

"alter the behavior of individual law enforcement officers or the policies of their departments." *Leon*, 468 U.S. at 918.

This Court has accordingly declined to apply the exclusionary rule where police conduct was "objectively reasonable." *Id.* at 922. The Court has also declined to apply the rule where the causal link between the constitutional violation and the discovery of the evidence is attenuated, or where "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2164 (2006). The Court has thus declined to apply the exclusionary rule on a strictly "but-for" basis, meaning that evidence will not be suppressed simply because unlawful police action led directly to its discovery. Instead, suppression is appropriate where the evidence has been discovered due to police exploitation of the illegal search or seizure. *Id.* (citing *Wong Sun* v. *United States*, 371 U.S. 471, 478-88 (1963)).

Suppression is appropriate in this case because the officer exploited an unlawful detention to conduct further investigation that ultimately led to the seizure of evidence that would otherwise have gone undiscovered. The prosecution pointed to no intervening factors between the illegal police activity and the discovery of the evidence to be suppressed that could have purged the taint of the unreasonable traffic stop. The identification of Petitioner, the discovery of his parole status, and his subsequent arrest and search were all the immediate and direct result of the illegal traffic stop. No intervening factors purged the taint of the initial stop, and the arrest and search would not have occurred absent the illegal stop. In using an unreasonable traffic stop as a stepping stone to a warrant check and subsequent arrest and search, the officer exploited the initial illegality in precisely the manner condemned by this Court in *Wong Sun* and *Hudson*.

Unlike the scenario in *Hudson*, where the defendant sought to suppress evidence seized pursuant to a lawful warrant that

was executed in an unlawful manner, this case presents a situation in which the deterrence benefits of suppression outweigh the "substantial social costs." Cf. *Hudson*, 126 S. Ct. at 2165. In *Hudson*, those costs included the possibility that evidence obtained pursuant to a valid search warrant, supported by probable cause and issued by a magistrate in compliance with the Fourth Amendment, would nonetheless be subject to suppression. *Id.* at 2166. Against that concern, the Court weighed the "value of deterrence" under the particular circumstances. The Court concluded that the incentive for police to violate the knock-and-announce rule was not high, given that such violations are unlikely to result in discovery of any evidence that could not otherwise be discovered through lawful means, and that the knock-and-announce rule exists, in part, for the protection of law enforcement officers. *Id.*

The competing interests in this case balance out differently. The only factor counseling against suppression is the concern that application of the exclusionary rule will mean that some crimes will go unpunished, but this interest is the same whether it is a passenger or a driver seeking suppression of evidence. On the other side of the equation, the factors supporting suppression are overwhelming. As has already been discussed at length *supra*, the passenger's liberty interest in not having his journey interrupted by unreasonable police conduct is the same as, if not stronger than, the driver's liberty interests. *Wilson*, 519 U.S. at 412-13.

Moreover, this case is distinguishable from *Hudson* in that the interest in protecting police here weighs in favor of suppression. As previously noted, the Court in *Hudson* found that because violations of the knock-and-announce rule posed a danger to police, the police have sufficient incentive to avoid such violations without the need to apply the exclusionary rule. *Hudson*, 126 S. Ct. at 2166. Here, as demonstrated by the California Supreme Court opinion below, the Court can only avoid application of the

exclusionary rule by adopting the legal fiction that a passenger is not detained during or immediately following a traffic stop. This fiction leads inexorably to the conclusion that, absent particularized suspicion that the passenger is involved in criminal activity, a passenger is free to exit the vehicle and leave the scene as soon as the car comes to a stop. *Brendlin*, 136 P.3d at 855 (JA 131-132).

However, as this Court observed in *Maryland* v. *Wilson*, the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." 519 U.S. at 414. The California opinion interprets *Wilson* to impose no burden upon a passenger amounting to a seizure unless the officer has ordered the passenger out of the vehicle, and deprives officers of the ability to order a passenger to remain in the car without particularized suspicion that the passenger poses a danger. *Brendlin*, 136 P.3d at 855-56 (JA 133-135). Thus the interest in protecting officer safety is best protected by avoiding the legal fiction adopted by California, affirming the long-standing presumption that a passenger is detained when an officer makes a traffic stop, and permitting a passenger to challenge the fruits of a traffic stop that is illegal at its inception.

Finally, if evidence seized as a result of an unlawful stop may be used against any passenger in the vehicle, even where the driver has successfully moved to suppress that evidence, the driver's protection against unlawful seizures has been diminished. Police would have little incentive to avoid making unreasonable traffic stops of any car containing multiple occupants, and in fact would be encouraged to engage in facially invalid traffic stops with increased odds that any evidence seized could be used against at least one occupant of the vehicle. The constitutional harm suffered by the occupants of a moving vehicle that is stopped without justification is not the indignity of a possible criminal prosecution resulting from the fruits of that justification, but

rather the invasion of privacy that results from the stop itself. As this Court has noted, the Fourth Amendment violation is "fully accomplished" by the illegal seizure, and the suppression of evidence does not cure that harm, but only serves to deter police from further unlawful activities. *Scott*, 524 U.S. at 362-63. If the evil to be avoided is not prosecution for a crime, but unreasonable invasion of a protected privacy interest, then the California rule diminishes protection against that evil.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Supreme Court of California and vacate the sentence.

Respectfully submitted,

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ELIZABETH CAMPBELL*
2407 J Street,
Suite 301
Sacramento, CA 95816
(916)-441-3792

Counsel for Petitioner

March 5, 2007

* Counsel of Record

48pgs 991

No. 06-8120

In The Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor
MICHAEL A. CANZONERI
Supervising Deputy Attorney General
DORIS A. CALANDRA
Deputy Attorney General
CLIFFORD E. ZALL
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Fax: (916) 324-2960
Counsel for Respondent

QUESTION PRESENTED

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

Page

Statement of the case 1

Summary of argument 4

Argument 7

I. As a passenger, petitioner was not "seized" under the Fourth Amendment merely by the police stop of the car in a routine manner 7

A. A person is not "seized" unless the police willfully use force or direct a show of authority at him 9

B. A person is not seized unless the conduct of the police would have communicated to a reasonable, innocent person that he was not free to decline the officer's requests or otherwise terminate the contact 15

C. A person is not seized unless he in fact is restrained or submits to a show of authority 17

D. Under these principles, petitioner was not "seized" under the Fourth Amendment when the driver of the car in which he was riding complied with Deputy Brokenbrough's routine show of authority and voluntarily stopped the car 18

1. When stopping the driver, Deputy Brokenbrough directed no willful police action at petitioner 18

2. A reasonable, innocent passenger would not have felt required to do anything in response to Deputy Brokenbrough's stopping of the car 21

TABLE OF CONTENTS – Continued

Page

3. Petitioner did not submit to a police show of authority just because the driver complied with the deputy's command to stop the car 24

4. Petitioner's other objections are unpersuasive 26

E. Petitioner was not "seized" until the officer ordered him out of the vehicle at gunpoint and arrested him under the outstanding warrant; as that arrest was lawful, evidence obtained incident to that arrest was not subject to suppression 34

II. Even if petitioner were unreasonably seized solely on account of the traffic stop, the evidence obtained at the scene would not be subject to suppression 37

Conclusion 41

TABLE OF AUTHORITIES

Page

CASES

Brower v. *County of Inyo*, 489 U.S. 593 (1989) ..... *passim*

Brown v. *Illinois*, 422 U.S. 590 (1975) 37

California v. *Hodari D.*, 499 U.S. 621 (1991) ..... *passim*

Delaware v. *Prouse*, 440 U.S. 648 (1979) 26, 27, 28

Florida v. *Bostick*, 501 U.S. 429 (1991) ..... *passim*

Florida v. *Royer*, 460 U.S. 491 (1983) 16

Hill v. *California*, 401 U.S. 797 (1971) 11

Hudson v. *Michigan*, 126 S. Ct. 2159 (2006) 31, 33, 37

I.N.S. v. *Delgado*, 466 U.S. 210 (1984) 16

Illinois v. *Caballes*, 543 U.S. 405 (2005) 33

Illinois v. *Gates*, 462 U.S. 213 (1983) 33

Landol-Rivera v. *Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) 13

Maryland v. *Wilson*, 519 U.S. 408 (1997) ..... *passim*

Michigan v. *Chesternut*, 486 U.S. 567 (1988) 16, 23, 24

Michigan v. *Summers*, 452 U.S. 692 (1981) 30, 31, 36

New York v. *Belton*, 453 U.S. 454 (1981) 31, 34

People v. *Brendlin*, 136 P.3d 845 (Cal. 2006) ..... *passim*

People v. *Brendlin*, 8 Cal.Rptr.3d 882 (Cal. Ct. App. 2004) 3

People v. *Jackson*, 39 P.3d 1174 (Colo. 2002) 13, 19, 20, 25

Rakas v. *Illinois*, 439 U.S. 128 (1978) 32, 34, 40

Reich v. *Minnicus*, 886 F.Supp. 674 (S.D. Ind. 1993) 32

TABLE OF AUTHORITIES – Continued

Page

South Dakota v. *Opperman*, 428 U.S. 364 (1976) 8

State v. *Frierson*, 926 So. 2d 1139 (Fla. 2006) 38

State v. *Hill*, 725 So. 2d 1282 (La. 1998) 38

State v. *Jones*, 17 P.3d 359 (Kan. 2001) 38

State v. *Page*, 103 P.3d 454 (Idaho 2004) 38

Terry v. *Ohio*, 392 U.S. 1 (1968) 9, 10

United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 9, 27

United States v. *Calandra*, 414 U.S. 338 (1974) 33

United States v. *Ceccolini*, 435 U.S. 268 (1978) 37

United States v. *Crews*, 445 U.S. 463 (1980) 37

United States v. *Drayton*, 536 U.S. 194 (2002) ... 16, 17, 24, 34

United States v. *Green*, 111 F.3d 515 (7th Cir. 1997) ... 38, 39

United States v. *Jacobsen*, 466 U.S. 109 (1984) 33

United States v. *Leon*, 468 U.S. 897 (1984) 32, 37

United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 8, 27

United States v. *Mendenhall*, 446 U.S. 544 (1980) 7, 13, 15, 16, 17

United States v. *Robinson*, 414 U.S. 218 (1973) 34

United States v. *Simpson*, 439 F.3d 490 (8th Cir. 2006) 38

United States v. *Williams*, 419 F.3d 1029 (9th Cir. 2005) 36

Whren v. *United States*, 517 U.S. 806 (1996) 26, 28, 32

TABLE OF AUTHORITIES – Continued

Page

Wong Sun v. *United States*, 371 U.S. 481 (1963).....37, 39

Wyoming v. *Houghton*, 526 U.S. 295 (1999)..... 31

CONSTITUTIONAL PROVISIONS

Fourth Amendment .....*passim*

STATUTES

42 U.S.C. § 1983..... 32

California Vehicle Code § 2800.1 19

California Vehicle Code § 2800 19

OTHER AUTHORITIES

W.R. LAFAVE, SEARCH & SEIZURE § 2.1(a) (4th ed. 2004)..... 14

STATEMENT OF THE CASE

1. At 1:30 a.m. on November 27, 2001, sheriff's deputy Robert Brokenbrough observed a car with expired registration tags traveling on South Barrett Road in Sutter County, California. (JA 34-35, 49.) Deputy Brokenbrough confirmed by police radio that the tags had expired and that an application for new registration was pending. (JA 45.) While following the car the deputy saw in its rear window a temporary operating permit marked with the number 11, representing the month of November and meaning that the temporary permit was good until the last day of the month. Deputy Brokenbrough had prior experience with people switching temporary operating permits from one car to another to avoid fines for expired registrations. He believed he needed to make sure that the permit actually belonged to the vehicle on which it was displayed. (JA 48, 50, 60-63.)

Deputy Brokenbrough "made a traffic stop on the vehicle." (JA 36.) He activated his patrol car's overhead lights to signal the driver to stop. The driver complied and stopped the car. (JA 49-50.) Deputy Brokenbrough pulled in behind the car and shined a spotlight on it in the night. (JA 50, 54.) Then he approached the driver's side of the vehicle and asked for the driver's license. The driver provided her license, which identified her as Karen Simeroth. (JA 37.) At that point, the deputy noticed one or two containers of a cleaner that, in his knowledge, was used in the manufacture of methamphetamine. (JA 40.) While still engaged with Simeroth, Deputy Brokenbrough asked petitioner Brendlin—the sole passenger, seated in the front seat—to identify himself. Petitioner falsely identified himself as "Bruce Brown." (JA 37.)

Deputy Brokenbrough, however, recognized petitioner as one of the Brendlin brothers, either Bruce or Scott. (JA 37.) He was also aware that one of the brothers was a parolee-at-large. (JA 37-38.) He ran a police radio check on petitioner; the dispatcher confirmed that petitioner indeed was a parolee-at-large. (JA 38.) While obtaining this information, Deputy Brokenbrough saw petitioner open the passenger door but remain in his seat. (JA 38-39.) Shortly, within a couple of minutes from when he asked Simeroth for her license, the deputy also was informed that there was a warrant out for petitioner's arrest. (JA 38.)

Deputy Brokenbrough requested back-up and, when other officers arrived, he ordered petitioner out of the car at gunpoint and arrested him under the warrant. (JA 39.) A search of petitioner revealed a syringe cap. (JA 39-40.) A pat-down search of Simeroth, undertaken for reasons of officer safety, yielded two syringes and a green leafy substance. (JA 41-43.) Simeroth then was arrested too. (JA 43.) Following Simeroth's arrest, Deputy Brokenbrough searched the car. On the front seat, between where the driver and a passenger would sit, he found a container of "tubing, a scale, and other items" related to the manufacture of methamphetamine. (JA 43-45.)

2. Petitioner was charged, in three counts, with possessing, transporting, and manufacturing methamphetamine. At his trial, he moved to suppress the evidence discovered at the scene of his arrest on the ground that his Fourth Amendment rights had been violated. After a hearing, the trial judge denied his motion. The judge concluded that the traffic stop was not unreasonable; that petitioner was free to leave once the car was stopped and was not detained until Deputy Brokenbrough ordered him out of the car and arrested him on the warrant; and that

petitioner lacked "standing" to bring a motion to suppress the items found in the car. (JA 85.) Following the denial of his suppression motion, petitioner entered a negotiated plea of guilty to manufacturing methamphetamine. (JA 87-98.) He was sentenced to an agreed-upon term of four years in state prison. (JA 96-97.)

3. On appeal, petitioner asserted that the trial court had erred in denying his suppression motion. The California Court of Appeal agreed and reversed the judgment. The appellate court held that a passenger is detained within the meaning of the Fourth Amendment when the car in which he is riding is subjected to a routine traffic stop, at least during the actual stopping of the vehicle. *People* v. *Brendlin*, 8 Cal.Rptr.3d 882, 886 (Cal. Ct. App. 2004). (JA 108.) The court also concluded that the passenger in such a situation may challenge the lawfulness of the vehicle stop. *Id.* at 887. (JA 109.) The court further ruled that the traffic stop in petitioner's case was unlawful because the circumstances were insufficient to support a reasonable suspicion of criminal activity. *Id.* at 887-88. (JA 109-10.) Finally, the appellate court ruled that, since the evidence seized from petitioner would not have been discovered but for the unlawful stop, it should have been suppressed. *Id.* at 888. (JA 111.)

The State appealed, and the California Supreme Court granted review. (JA 112.) The State conceded that the traffic stop had not been supported by reasonable suspicion of criminal activity. (JA 119). But the State argued that petitioner, as a passenger, had not been "seized" within the meaning of the Fourth Amendment merely by the stopping of the car in a routine traffic stop. In the State's view, petitioner was not seized until Deputy Brokenbrough ordered him out of the car at gunpoint and

arrested him pursuant to the outstanding warrant. (JA 119). The State further argued that, even if petitioner had been unlawfully seized prior to the discovery of the warrant, the challenged evidence was properly admissible as the product of an intervening lawful search incident to his arrest under the warrant.

The California Supreme Court reversed the judgment of the intermediate appellate court. The state supreme court held that, even though his progress is momentarily stopped as a practical matter, a passenger in a car subjected to a traffic stop is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority. *People* v. *Brendlin*, 136 P.3d 845, 846 (Cal. 2006). (JA 114.) The court therefore concluded that petitioner was not "seized" when the driver submitted to the police officer and brought the car to a stop. *Id.* at 855. (JA 132.) Because the court decided that petitioner's Fourth Amendment rights had not been implicated by the car stop, it did not reach the State's alternative argument that, even if the stop of the car had subjected petitioner to an unlawful seizure, his later arrest under the pre-existing warrant purged any taint from the stop so that the evidence was not subject to suppression in any event.

SUMMARY OF ARGUMENT

1. As a mere passenger in the car when the driver was stopped by the police in a routine manner for a traffic violation, petitioner was not thereby "seized" within the meaning of the Fourth Amendment. Contrary to

petitioner's one-dimensional argument, whether the passenger's freedom of movement was affected as a factual matter is not the determinative legal question. Rather, a person is "seized" within the meaning of the Fourth Amendment during a contact with police only if (1) the objective circumstances show that the police officer willfully directed at the person a show of authority or use of force, (2) the police actions would have communicated to a reasonable, innocent person that he or she was not free to decline the officer's requests or otherwise terminate the contact, and (3) the person in fact was restrained or submitted to a show of authority. Under these correct standards—drawn from a logical extension of this Court's decision in *Brower* v. *County of Inyo* and from its holdings in *Florida* v. *Bostick* and *California* v. *Hodari D.*—the routine stop of the car in which petitioner was traveling as a passenger did not result in his "seizure."

When Deputy Brokenbrough activated the lights of his patrol car to order driver Simeroth to pull over, in a routine manner typical of traffic-violation stops, the objective facts showed that it was the driver who was the object of the deputy's command. Absent anything more, the simple show of authority used by the deputy in this case could not reasonably be said to be directed at petitioner, a mere passenger in the car. Any effect on petitioner was unintended and coincidental. Like a merely accidental interference with a person's movements, and like many unremarkable official commands that commonly delay travelers on the road, the unintended or coincidental effect on petitioner's movement caused by the stop of the car in this case did not amount to a "seizure" in the constitutional sense.

Even if such a show of authority were deemed to extend to passengers in the car, it would nevertheless remain true that only the driver would thereby be seized under the Fourth Amendment. Certainly, Simeroth was seized, because no reasonable person in her position would have felt free to disregard the officer's command to pull over the vehicle, and she in fact submitted to that request. But petitioner's situation was completely different. During the initial stopping of the vehicle, there was no encounter between the officer and petitioner. The deputy asked nothing of petitioner; and the deputy's action in stopping the car did not compel or coerce him to do anything.

Moreover, and typical for a mere passenger, petitioner himself did not submit to any request or order given by the officer in the stopping of the car. Only driver Simeroth was in control of the car. Absent physical restraint—and none was used in this case—a seizure requires a submission to a show of authority. Petitioner was not "seized" until Deputy Brokenbrough ordered him out of the vehicle at gunpoint and arrested him under the warrant. Any evidence obtained from petitioner was properly seized in a search incident to that lawful arrest and cannot be subjected to suppression under the Fourth Amendment exclusionary rule.

2. Even if petitioner had been unlawfully "seized" by the traffic stop alone, the challenged evidence in this case would remain admissible. Petitioner's subsequent arrest, and the search of his person and the vehicle, were the immediate result of the intervening radio report of petitioner's outstanding arrest warrant. The discovery of the challenged evidence in those searches was sufficiently attenuated from the traffic stop so as to dissipate any taint

from it. Application of the Fourth Amendment exclusionary rule, therefore, would not be justified.

ARGUMENT

I. AS A PASSENGER, PETITIONER WAS NOT "SEIZED" UNDER THE FOURTH AMENDMENT MERELY BY THE POLICE STOP OF THE CAR IN A ROUTINE MANNER

The Fourth Amendment to the United States Constitution provides that people shall "be secure in their . . . persons against unreasonable searches and seizures." U.S. Const., Amend. IV. But consensual encounters or otherwise inoffensive contacts between law enforcement and the public not amounting to a "seizure" do not implicate the Fourth Amendment. See *Florida* v. *Bostick*, 501 U.S. 429, 434-35 (1991); *United States* v. *Mendenhall*, 446 U.S. 544, 554-55 (1980) (plurality opinion).

The question before this Court is "whether a passenger in a vehicle subject to a traffic stop is thereby 'detained' for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop." The answer depends upon whether the passenger was "seized" within the meaning of the Fourth Amendment by the police action in stopping the vehicle. Petitioner asserts that resolution of the issue is "straightforward." Petr.'s Br. 9. However, as with most questions that reach this Court, the correct answer is not a superficial or simple one.

In petitioner's view, similar to assumptions made by a number of courts, any purposeful interference with a passenger's liberty interest in his freedom of movement settles the "seizure" inquiry. See Petr.'s Br. 21-22; *People*

v. *Brendlin*, 136 P.3d at 850-51 (citing cases). (JA 122-23.) But petitioner's contention ignores the everyday realities of modern day life. On a busy one-lane road, a police investigatory stop of one car might impede the freedom of movement of the occupants of many other cars. It would be implausible, however, to assert that all those occupants—some of whom might be so far away that they would not even know the cause for their delay—have been "seized" by the police. Similarly, when the police turn away automobile traffic after a collision, they interfere with the freedom of movement of those whose vehicles they redirect—but they do not "seize" all of those people. Stop signs, speed limits, and other means of controlling the movement of automobiles on the highway, are pervasive reminders that nobody, passenger or otherwise, reasonably may expect complete freedom of movement without governmental interference in a motor vehicle on the highway. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561-62 (1976); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976).

The answer to the question of whether petitioner was "seized" by the police action in stopping the car in which he was traveling does not follow automatically from petitioner's simple assertion that his freedom of movement was affected. Rather, the answer follows from the application of principles underlying this Court's decisions that distinguish "seizures" in the constitutional sense from other police-citizen contacts not implicating the Fourth Amendment. Under those principles, as identified below, a

passenger such as petitioner is not "seized" merely by the routine traffic stop[1] of the vehicle in which he is traveling.

A. A Person Is Not "Seized" Unless The Police Willfully Use Force Or Direct A Show Of Authority At Him

The logic and the development of this Court's definition of a "seizure," as reflected in a comparison between *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), support the principle that a person is not "seized" for Fourth Amendment purposes unless, based on the objective facts, the police willfully use force against him or direct a show of authority at him. An incidental interference with the liberty of an unintended object of the police conduct—similar to an accidental interference with a person's liberty—should not be deemed a "seizure" in the constitutional sense.

1. In *Terry*, the defendant was grabbed by an officer who then frisked him for weapons. This Court made it clear that such physical restraint constituted a Fourth Amendment "seizure." 392 U.S. at 15-16; accord, *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). In the case at bar, petitioner Brendlin cites a broader assertion from *Terry*—that a seizure takes place whenever an officer's actions result in a restriction on a person's liberty. See Petr.'s Br. at 9, 19, 22 (citing *Terry*, 392 U.S. at 19 n.16.) But, in *Brower*, the Court limited this broad

[1] By "routine traffic stop," the State means those stops in which the police in a single patrol vehicle use their lights and/or siren to order a driver to stop and the driver complies. The State also describes this type of stop as a routine manner stop.

assertion in *Terry* by explaining that "seizures" must in some sense be "intentional." 489 U.S. at 596.

2. In *Brower*, a driver was killed when he crashed his car into a police roadblock. This Court concluded that the police action in placing the roadblock indeed had subjected the driver to a "seizure" in the constitutional sense. *Id.* at 599. However, the Court also explained:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Id. at 596-97 (emphasis in original).

Brower in this way limited the broader *Terry* language, on which petitioner relies, that any restriction on a person's liberty constitutes a Fourth Amendment "seizure." Instead, a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower*, 489 U.S. at 596. That is, the Fourth Amendment is concerned only with intentional governmental action that restricts a person's liberty.

In explaining this limitation, the Court in *Brower* distinguished purposeful police conduct from police conduct that only accidentally impairs a person's freedom. The latter, the Court indicated, would not amount to a "seizure." *Brower*, at 596. For "[t]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." *Id.* (citation omitted) "The writs

of assistance that were the principal grievance against which the Fourth Amendment was directed did not involve unintended consequences of government action." *Id.* (citations omitted).

Consistent with the limited purposes of the Fourth Amendment, *Brower* logically may be extended to support the conclusion that a person is not "seized" unless police action is willfully directed at him. The concept of a Fourth Amendment seizure does not embrace "an unknowing act." *Brower*, at 596. *Brower* indicated the significance of ascertaining the object of a police officer's action when it confirmed that "a seizure occurs even though an unintended person or thing is the *object* of the detention or taking." *Id.* at 596. (emphasis added). Coincidental effects of police activity on a person who is not the "object" of the police conduct reasonably may be treated as "unintended consequences." Such a person would not be the object of "intentional acquisition" of control by the officer. Any restriction on such person's liberty would be accidental or coincidental.

Petitioner ostensibly relies on the same language from *Brower*—that "[a] seizure occurs even though an unintended person or thing is the object of the detention or taking"—but he misuses it as if it had addressed "unintended persons" who were *not* the objects of the detention. Petr.'s Br. 17. Instead, the Court simply was illustrating that willful police conduct in physically grasping the body of a person amounts to a seizure of that person, even in a case of mistaken identity, for the physical being or person captured still clearly remains the *object* of the police action. *Brower*, 489 U.S. at 596 (citing *Hill* v. *California*, 401 U.S. 797 (1971)). That situation is very different from one in which the police purposely stop

the driver, and the stopping of the car happens to incidentally affect a passenger who was not the *object* of the police action.

The proposition that a person is "seized" only if he or she is the object of willful police action is supported by other statements by the Court in *Brower*. The Court stated:

> We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough therefore, that . . . Brower was meant to be stopped by the physical obstacle of the roadblock and that he was so stopped.

Brower, 489 U.S. at 599. In other words, Brower was seized not because the police acted deliberately in placing the roadblock, but because they acted deliberately *to stop Brower* by placing the roadblock. He was the intended object of the police action in placing the roadblock, and that roadblock terminated his movement.

3. Given the "intentional governmental action" limitation on the Fourth Amendment recognized in *Brower*, it also makes sense to recognize that a "seizure" requires not merely that the police conduct is undertaken deliberately but also that it is directed at a particular person. Incidental intrusions are similar to accidental intrusions on liberty, which are not "seizures." As with accidental intrusions, an incidental or coincidental interference with a person who is not the object of police conduct is also an "unintended consequence of government action."

For example, if the police stop person A's car on a one-lane road and thereby interfere with the freedom of movement of person B, whose vehicle is blocked by A's car,

the restriction on B's liberty is not the intended consequence of the police action regardless whether the police conduct was purposeful rather than accidental. In the example, A is "seized" because he is the object of willful police action. Person B, however, should not be deemed "seized": although the police acted deliberately and that deliberate action restricted his liberty, the police action was not directed at B.[2] The restriction on B's liberty is, in the language of *Brower*, an "unintended consequence of government action." 489 U.S. at 596. "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." *Landol-Rivera* v. *Cruz Cosme*, 906 F.2d 791, 794-96 (1st Cir. 1990); see *Maryland* v. *Wilson*, 519 U.S. 408, 420 (1997) (Stevens, J., dissenting).

4. Extending the *Brower* analysis, to require that police action be directed at a particular person before he or she may be deemed "seized," would also distinguish Fourth Amendment seizures from everyday occurrences

---

[2] Petitioner mistakenly asserts that taking account of the object of a police officer's actions would inappropriately inject the issue of the officer's subjective intentions into the resolution of the question whether a "seizure" occurred. Petr.'s Br. 17. Determining the object of the police action requires, instead, an evaluation of the outward objective circumstances. The officer's subjective intentions are irrelevant to that objective inquiry. Petitioner is also incorrect in suggesting that the California Supreme Court said anything to the contrary in this case. See *Brendlin*, 136 P.3d at 851 (JA 124) (considering facts of stop and determining that officer's actions were directed at driver); see also *People* v. *Jackson*, 39 P.3d 1174, 1185-86 (Colo. 2002) (same). In any event, as this Court has indicated, the officer's subjective intentions may become relevant when they are communicated to citizens interacting with the officer. Communication of the officer's intentions of course may affect the reactions of the reasonable person. See *Mendenhall*, 446 U.S. at 554, n.6.

such as a police officer redirecting traffic at an accident scene or inadvertently delaying others in the course of investigating crime. The citizens whose free movement is affected in such instances are not thereby "seized" under the Fourth Amendment. See *Wilson*, 519 U.S. at 420 (Stevens J., dissenting). Even though the officer's actions are undertaken deliberately, and the impact on the affected citizens' movements is no accident, the officer objectively manifests no purpose or intention to affect the movement of any particular person as an individual.

5. Thus, *Brower* tends to support, and logic reinforces, the validity of the principle that a "seizure" requires that the police action was directed at the person who is claiming the protections of the Fourth Amendment. See *Wilson*, 519 U.S. at 420 (Stevens, J., dissenting). This principle, would apply equally to a case involving application of physical force as in *Brower*, see 489 U.S. at 596-98, and to a case, such as the one at bar, which involves a police show of authority carried out by the well-recognized command implicit in a police officer's activation of the overhead lights on his patrol car. See *id.* at 597 (attempting to stop a car by flashing lights and pursuit is a show of authority.); *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991) (same). It would make little sense to say that seizures by physical force must be directed at a particular person to implicate the Fourth Amendment but those effectuated through a show of authority may occur inadvertently or incidentally. Cf. W.R. LAFAVE, SEARCH & SEIZURE, § 2.1 (a) (4th ed. 2004) (implying that *Brower* applies to all seizures).

B. A Person Is Not Seized Unless The Conduct Of The Police Would Have Communicated To A Reasonable, Innocent Person That He Was Not Free To Decline The Officer's Requests Or Otherwise Terminate The Contact

Although necessary, it is not enough, in determining if a "seizure" occurred, to identify who was the object of a police show of authority under the principles outlined above. The police contact with that person must be evaluated further to see if it would have communicated to a reasonable, innocent person that he or she was not free to decline the officer's requests or otherwise terminate the contact. Under this standard, a passenger in a car stopped in the manner typical for traffic violations ordinarily would not be "seized."

The standard derives from *United States* v. *Mendenhall*, 446 U.S. 544, which involved a police-citizen contact at an airport, and from *Florida* v. *Bostick*, 501 U.S. 429, which involved a police contact with a passenger aboard a bus. In these cases, the question was whether the police conduct, although short of physical restraint, nevertheless was so coercive as to constitute a Fourth Amendment "seizure." In analyzing this particular issue, the Court viewed the police-citizen encounter from the perspective of a reasonable citizen. *Mendenhall*, 446 U.S. at 553-56; *Bostick*, 501 U.S. at 434-38. In *Mendenhall*, Justice Stewart's plurality opinion endorsed a coercive-effect inquiry aimed at determining whether a reasonable person under the circumstances would "feel free to leave." Only when a hypothetical reasonable person would feel unable to leave could the encounter be deemed so coercive as to constitute a restriction on a citizen's liberty and thus a Fourth Amendment "seizure." *Mendenhall*, 446 U.S. at 554; see

also *Michigan* v. *Chesternut*, 486 U.S. 567, 573-74 (1988); *I.N.S.* v. *Delgado*, 466 U.S. 210, 216 (1984); *Florida* v. *Royer*, 460 U.S. 491, 501-02 (1983) (applying *Mendenhall* test).

In *Bostick*, this Court refined the *Mendenhall* test to more fully encompass all the situations in which police encounter citizens. The *Bostick* Court asked whether, in considering all of the circumstances surrounding the encounter, the reasonable, innocent citizen would feel unable to decline the officer's requests or otherwise terminate the encounter. 501 U.S. at 438-40. The Court considered this new standard to be a more accurate gauge of whether, even in the absence of physical restraint, the police-citizen contact was so coercive as to result in a "seizure." This was a more accurate inquiry, the Court indicated, because there are some circumstances in which a citizen's desire not to leave the scene would be attributable to factors other than coerciveness in the police conduct. See *id.* at 435-36. The Court noted that,

> the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.

Id. at 436. The Court in *Bostick* also affirmed that its revision of Justice Stewart's *Mendenhall* inquiry was applicable to all police-citizen encounters. 501 U.S. at 439-40; see also *United*

States v. *Drayton*, 536 U.S. 194, 201-06 (2002) (applying *Bostick* test).

C. A Person Is Not Seized Unless He In Fact Is Restrained Or Submits To A Show Of Authority

Finally, in *California* v. *Hodari D.*, 499 U.S. 621, this Court confirmed that even more is required to comprise a Fourth Amendment "seizure." *Hodari D.* requires considering the reactions of the particular citizen in response to the police actions. The Court in *Hodari D.* determined that actual submission was required before that person could be "seized" within the meaning of the Fourth Amendment. *Id.* at 626. The concept of a Fourth Amendment "seizure" does not extend, the Court emphatically declared, "to the prospect of a policeman yelling 'Stop in the name of the law!' at a fleeing form that continues to flee." *Id.* Attempts to seize a person were not "seizures" unless they were successful. The Court's ruling thus implied that, no matter how coercive the police action might appear to the reasonable citizen, there would be no "seizure" under the Fourth Amendment if it did not coerce the citizen at whom it was directed.

As *Hodari D.* made clear, to say that a reasonable, innocent person would not have felt free to decline the police requests or terminate the encounter under the *Mendenhall-Bostick* standard would be to state a necessary but not sufficient condition for a show-of-authority Fourth Amendment "seizure." Rather, there must also be submission to that show of authority. *Hodari D.*, at 627-28.

* * *

As demonstrated above—and as the California Supreme Court in this case correctly concluded—a person

is "seized" within the meaning of the Fourth Amendment during a contact with police only if (1) the objective facts indicate that the officer's willful use of force or show of authority was directed at the person; (2) the police conduct would have communicated to a reasonable, innocent person that the person was not free to decline the officer's requests or otherwise terminate the contact; and (3) the person in fact was restrained or submitted to any show of authority.

D. Under These Principles, Petitioner Was Not "Seized" Under The Fourth Amendment When The Driver Of The Car In Which He Was Riding Complied With Deputy Brokenbrough's Routine Show Of Authority And Voluntarily Stopped The Car

Petitioner was a passenger in a car that was stopped in a routine manner by Deputy Brokenbrough. Under the principles set out above, petitioner was not "seized" within the meaning of the Fourth Amendment. He may not challenge the reasonableness of the stop, for it did not infringe on his own personal Fourth Amendment rights.

1. When stopping the driver, Deputy Brokenbrough directed no willful police action at petitioner

As explained above, the first inquiry in determining if a person has been subjected to a "seizure" of constitutional dimensions is whether, based upon the objective facts, the police conduct was willfully directed at the person claiming the protection of the Fourth Amendment. See *Brower*, 489 U.S. at 596-99. Here, however, any effect on petitioner's freedom was unintended and merely incidental to the stop of driver Simeroth.

The police stop of the vehicle in which petitioner was riding was done in a routine manner typical of traffic-violation investigations. By illuminating the patrol-car overhead lights, Deputy Brokenbrough in effect commanded the driver Simeroth to pull over. (JA 49-50.) The show of authority was intended to induce voluntary compliance by the driver with the officer's order. See *Brower*, 489 U.S. at 598. Failure to comply would have subjected Simeroth to legal consequences. See, *e.g.*, Cal. Vehicle Code §§ 2800, 2800.1 (requiring driver to pull over when signaled by law enforcement). The driver was the one the deputy was attempting to control through his show of authority. Indeed, the driver in control of the car is the only one who the officer could have realistically expected to submit to the show of authority.

This conclusion is reinforced by the pervasiveness of such routine stops. The public is familiar with the routine and they know that events typically confirm that the police were merely interested in investigating and citing the driver for a traffic violation. As the California Supreme Court recognized in this case, see *Brendlin*, 136 P.3d at 851 (JA 125), the nature of the typical stop strongly supports the proposition that, absent unusual circumstances, there is no reason for anyone present to assume that the initial police action is directed at anyone other than the driver. "While we are all familiar with the sinking feeling a driver experiences upon seeing police lights in the rearview mirror, few of us sense impending doom when we are in the passenger seat." *Id.*; see also *People* v. *Jackson*, 39 P.3d at 1185.

There was no reason to think that Deputy Brokenbrough's actions were directed at petitioner.

The deputy might not even have been aware of petitioner's presence. In many such stops executed in this routine way, the officer will not be aware of any passengers. And many passengers—for example, those who remain asleep—will not be aware of the police officer. Absent additional circumstances, the routine manner of the stop in this case could not have resulted in the seizure of anyone other than the driver.

It is not enough to say, as petitioner does, that the officer "intended" to stop the vehicle and everyone in it. Petr.'s Br. 17-20. As established above in the discussion of *Brower*, see pp. 9-14, *ante*, a Fourth Amendment "seizure" requires not merely that the police acted intentionally but also that the action was directed at a particular individual. Although Deputy Brokenbrough acted willfully in stopping the vehicle in which petitioner was traveling, petitioner was not the object of that police action. The fact that the stop of the vehicle was not an accident is of no moment: whether the deputy stopped the car on purpose or by accident, any effect on petitioner was only an "unintended consequence" of the officer's action. The officer's show of authority in the routine stop of a vehicle cannot by itself subject the passenger to "intentional acquisition" of police control through "means intentionally applied." See *Brower*, 489 U.S. at 596-97. Any intrusion on petitioner's liberty occasioned by the driver's compliance with the officer's show of authority was incidental or inadvertent and did not implicate his Fourth Amendment rights. See *Wilson*, 519 U.S. at 420 (Stevens, J., dissenting); *Jackson*, 39 P.3d at 1186.

2. A reasonable, innocent passenger would not have felt required to do anything in response to Deputy Brokenbrough's stopping of the car

The stop of the car in this case fails to meet a second requirement for a "seizure" of a person traveling as a passenger. Specifically, the deputy's actions would not have communicated to a reasonable, innocent person that he was not free to decline the deputy's requests or otherwise terminate any contact. See *Bostick*, 501 U.S. at 436-38. Petitioner disputes the applicability of this test, but his efforts are not persuasive.

a. Application of *Bostick* to the contact between petitioner and Deputy Brokenbrough during the stopping of the vehicle in this case leads to the conclusion that petitioner was not "seized" within the meaning of the Fourth Amendment. During the initial stopping of the vehicle, no command or request was directed from the officer to petitioner. Obviously, the officer commanded driver Simeroth to stop the vehicle; but, as explained above, that action was not directed at petitioner. The police action in stopping this vehicle did not compel petitioner to do anything. In a commonplace and typical stop such as this one, no reasonable person in petitioner's position would have felt coerced or compelled to do anything. There was nothing for a petitioner, as a passenger, to do.

Whether a reasonable person in petitioner's position might not have felt free to leave a moving vehicle is not, after *Bostick*, the relevant inquiry. The passenger's ability to avoid the police does not depend on his feeling free to leave the scene. *Bostick*, 501 U.S. at 436. "After all, an individual may manifest an unwillingness to engage with

the police not only by departing the area, but also by staying put and declining to answer questions or otherwise ignoring police inquiries." *Brendlin*, 136 P.3d at 852 (JA 126-27).

b. Petitioner asserts that a traffic stop is "a forcible physical restraint of an individual's 'freedom of action'" and not simply a "show of authority." Petr.'s Br. 8. He then argues that the *Bostick* "reasonable person" test is inapplicable to an encounter where an officer uses force to impede a citizen's movements. Petr.'s Br. 22-24. Petitioner's characterization of the police action is refuted, however, by this Court's discussion in *Brower*. There, the Court explained the differences between the roadblock used in that case and more-routine means such as were used here. This Court stated,

> In marked contrast to a police car pursuing with flashing lights or to a policeman in the road signaling an oncoming car to halt, a roadblock is not just a *significant show of authority* to induce a voluntary stop, but is designed to produce a physical stop by impact if voluntary compliance does not occur.

Brower, 489 U.S. at 598 (emphasis added) (citations omitted). "The pursuing police car sought to stop the suspect only by the *show of authority represented by flashing lights* . . . ." *Id.* at 597 (emphasis added). The Court viewed the use of a roadblock as akin to the use of physical force to restrain a suspect, and it distinguished a show of authority designed to produce "a voluntary stop." See also *Hodari D.*, 499 U.S. at 625-26 (officer's pursuit calling upon suspect to halt equals show of authority "seizure" if suspect complies).

Moreover, as noted at the outset of this brief, anomalous results would follow from petitioner's view that the simple fact of restraint on an individual's "freedom of action" settles the constitutional inquiry of whether a "seizure" has occurred. See p. 8, *ante*. Under petitioner's theory, all taxi cab and bus passengers would be "seized" under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light. For, in what seems to be petitioner's view, those passengers would be subjected to a purposeful curtailment of their "freedom of action" whenever a police officer purposefully stops the cab or bus in which they were traveling. Equally anomalous, the same "seizure" characterization would attach in the case of passengers on a train or cruise ship if the police stopped the train or ship to investigate or cite the engineer or captain.

Petitioner would treat restraints on the mode of transport, without regard to such considerations as the coerciveness of the police action, as the key fact in determining whether a "seizure" has occurred. Cf. *Michigan* v. *Chesternut*, 486 U.S. at 573 ("[test] is . . . designed to assess the coercive effect of police conduct, taken as a whole . . ."). So, for example, passengers on a stationary bus who are prevented from proceeding immediately to their desired destination would not be "seized" when subjected, by armed officers, to questioning and requests to search luggage. Yet those same passengers, if on a bus that had left the station before being immediately stopped because the driver ran a stop sign, would be deemed "seized" merely on account of their presence in the stopped vehicle. No reasonable passenger would view the latter scenario as more intrusive on his liberty than the former—and yet the former situation does

not amount to a Fourth Amendment "seizure." *United States* v. *Drayton*, 536 U.S. at 203-05. Indeed, the curtailment of freedom of movement, if any, is arguably greater in this same "non-seizure" scenario. The bus passenger in the *Drayton* situation described above will be delayed from reaching his desired destination while the officers speak with perhaps all of the bus passengers. Thus it is possible he will be delayed for a longer period than passengers who are delayed while the officer simply cites the bus driver for running the stop sign.

This Court's cases, as argued above, demand more than a one-dimensional inquiry. If petitioner had been subjected to a show of authority in this case, a court hearing his claim should undertake the *Bostick* inquiry to determine the coercive effect of this interaction. See *Hodari D.*, 499 U.S. at 627-28; see also *Bostick*, 501 U.S. at 436-37 (test applies to all police-citizen interactions involving show of authority regardless of where they take place); *Michigan* v. *Chesternut*, 486 U.S. at 574 ("test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings . . .").

3. Petitioner did not submit to a police show of authority just because the driver complied with the deputy's command to stop the car

The final requirement for a Fourth Amendment "seizure" is submission to the show of authority. *Hodari D.*, 499 U.S. at 626-27. As a passenger in a vehicle during its routine stop by police, petitioner did not submit to the officer's show of authority. It was not for petitioner to respond to the officer's show of authority in this case. A passenger might object vociferously to the driver's

submission, but "[t]he passenger simply has no say in the matter." *Brendlin*, 136 P.3d at 852. (JA 125-26.) "The stop of the passenger is merely an unavoidable result of the driver's acquiescence in the police officer's command." *Jackson*, 39 P.3d at 1185. But she has not submitted to the officer's show of authority and is therefore not "seized." *Id.*

For example: During the driver's compliance with the officer's command to stop the car, a passenger repeatedly might make it known that she does not want the driver to stop and she indeed might leap from the car and immediately flee from the scene. It would make little sense to say that the passenger was "seized" by the driver's stopping of the vehicle. Under petitioner's simplistic "curtailment" formula, see Petr.'s Br. 8, 21-24, however, the passenger in such circumstances anomalously would be "seized" as her freedom of movement was curtailed during the driver's submission. Or, taking the hypothetical one step further: The passenger might want the driver to stop, but the driver might refuse and attempt to evade the police officer. No one could reasonably argue that the passenger was "seized" because she somehow had submitted to the show of authority.

Even after the stop itself, the passenger does not necessarily submit by simply remaining in the vehicle in the absence of some police action directed at him. His choice to remain says nothing about whether the police action had compelled him to do so or whether he simply chose to remain where he had been, perhaps because it would be more convenient or because his business is with the driver. *Brendlin*, 136 P.3d at 852 (citing *Bostick*, 501 U.S. at 436). (JA 126.)

For the same reasons that he claimed that *Bostick* is inapplicable—i.e., that this case allegedly involves the physical accosting of the vehicle and its occupants—petitioner argues that the *Hodari D.* requirement of submission to a show of authority is also inapplicable. Petr.'s Br. 21. But, again, a routine traffic stop involves a show of authority designed to produce voluntary compliance. See *Brower*, 489 U.S. at 598. Therefore, the *Hodari D.* test applies. *Hodari D.*, 499 U.S. at 626.

Under *Hodari D.*, in sum, petitioner was not "seized" merely by the driver's submission to the show of authority in the routine police stopping of a vehicle.

4. Petitioner's other objections are unpersuasive

Although the State's analysis of the question, as set out above, answers the bulk of petitioner's contentions, some remaining ones may be briefly addressed individually as follows:

a. Petitioner relies on dicta from this Court's decisions to support his view that a passenger is necessarily "seized" by a routine police stop of a vehicle. In particular, petitioner cites to dicta in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), *Whren* v. *United States* 517 U.S. 806 (1996), and *Maryland* v. *Wilson*, 519 U.S. 408. Petr.'s Br. 10-13. None of these cases provides significant support for his position.

Although *Prouse* is often cited as authority for the view that a passenger is "seized" during a routine traffic stop, see Petr.'s Br. 11-13; *Brendlin*, 136 P.3d at 850 (JA 122), a passenger's ability to contest the legality of the

stop of the vehicle was neither litigated nor decided in that case.[3] The parties' briefing assumed that Prouse had been the driver of the car. This Court stated that it had granted certiorari to settle a split in the circuits over the validity of the police practice of stopping cars without any founded suspicion to check drivers' licenses and vehicle registrations. 440 U.S. at 650-51. It did not discuss any question of a passenger's "standing" to challenge the practice or of the passenger's "standing" versus that of the driver.

For those reasons, petitioner reads too much into *Prouse's* statement that "stopping an automobile and detaining its occupants constitutes a 'seizure'" under the Constitution. 440 U.S. at 653. Moreover, in that passage of its opinion, the Court relied on cases in which all occupants of a vehicle—passengers and driver—had at some point become the object of the officers' suspicionless detentions. *Id.*, citing *Martinez-Fuerte*, 428 U.S. at 556-58; *Brignoni-Ponce*, 422 U.S. at 876-78. *Prouse* does not settle the question of whether the stopping of a vehicle in a routine manner in and of itself results in a Fourth Amendment "seizure" of a passenger.

---

[3] The conclusion that the issue was not decided by this Court is supported by the case documents in *Prouse*. In their briefs on the merits, both parties acknowledged that Prouse had been the driver of the car stopped by the New Castle County patrol officer. *Delaware* v. *Prouse*, No. 77-1571, Brief for the State of Delaware, 1978 WL 223148 at 3; *Delaware* v. *Prouse*, No. 77-1571, Brief for Respondent, 1978 WL 223149 at 3. The Supreme Court of Delaware and the Superior Court of Delaware also had identified Prouse as the driver. *State* v. *Prouse*, 382 A.2d 1359, 1361 (Del. 1978); *State* v. *Prouse*, No. 176-12-0213, 1977 WL 364586 at 1 (Del.Super., March 10, 1977).

Likewise unpersuasive is petitioner's citation to this Court's statement in *Whren*, 517 U.S. at 809-10, that "temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' . . . ." Petr.'s Br. 11. As with *Prouse*, the issue of a passenger's "standing" was neither litigated nor decided in *Whren*. The issue in *Whren*, instead, was the validity of a "pretext stop."[4] *Whren* does not hold that a detention of a passenger necessarily occurs by virtue of a routine traffic stop.

Petitioner also relies on *Maryland* v. *Wilson*, 519 U.S. 408. Petr.'s Br. 11-12. In *Wilson*, the Court merely held that an officer making a routine traffic stop may, as a matter of course, order passengers out of a lawfully stopped car to ensure officer safety. 519 U.S. at 414-15. The Court in *Wilson* did not hold that the mere stop of the car "seized" the passenger. In fact, it may be inferred that the majority in *Wilson* declined to treat the passenger as

---

[4] The "question presented," as framed by the petitioners Whren and Brown, was "[w]hether a pretextual traffic stop undertaken by plainclothes vice officers who were prohibited by police department regulations from making routine traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances would have made such a stop." Brief for Petitioners, *Whren* v. *United States*, 95-5841, 1996 WL 75758 at i. The "question presented" in the respondent's brief was "[w]hether the stop of petitioners' vehicle after police officers observed the driver commit traffic violations violated the Fourth Amendment." Brief for Respondent, *Whren* v. *United States*, 95-5841, 1996 WL 115816 at i. The Court stated: "In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Whren*, 517 U.S. at 808.

automatically "seized." The majority framed the question as whether the intrusion on the passenger's liberty occasioned by the officer's order was justified. *Id.* at 413-14. But, if a passenger were thought to be "seized" merely by the stopping of the car, the majority would likely have framed a different question, i.e., whether a passenger's *continued* detention could be justified on the basis of officer safety. There is, however, no discussion of a continuing detention in the Court's opinion. Moreover, the majority's reference to Maryland's request that the Court permit the forcible detention of the passenger for the duration of the stop, *id.* at 415, n.3, would have been superfluous if the passenger already had been detained by the stop.

In his dissenting opinion in *Wilson*, Justice Stevens was explicit. His dissent observed that any

> intrusion on the passengers' liberty occasioned by the initial stop of the vehicle . . . was a necessary by-product of the lawful detention of the driver. But the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state imposed delay not directed at a particular individual constitutes a seizure of that person.

Wilson, at 420 (Stevens, J., dissenting.)

Petitioner retorts by citing the *Wilson* Court's statement that, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." Petr.'s Br. 12 (quoting *Wilson*, 519 U.S. at 414.) But to say that the passenger was stopped as a "practical matter" begs the question of whether he was seized as a legal matter. The

Court in *Wilson* did not state that the passenger was *detained* by the stop of the car as a *constitutional* matter.

Petitioner further argues that the holding in *Wilson* could not be justified in the absence of a finding that the passenger was detained by the stopping of the vehicle. Petr.'s Br. 12. He is mistaken. Even if the initial Fourth Amendment intrusion on Wilson's liberty was the officer's order to get out of the car, rather than the stop of the car, that initial intrusion was justified by the weighty interest in officer safety. *Wilson*, 519 U.S. at 414-15. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court found that the same officer-safety interest justified an initial Fourth Amendment intrusion upon the defendant, who was prevented from leaving the premises that the police had arrived to search pursuant to a warrant. *Id.* at 702-03. Contrary to petitioner's reading, the Court did not consider the intrusion on Summers to be limited because he already had been "seized" and was merely relocated. Rather, the Court considered the initial detention of Summers to be "only an incremental intrusion on personal liberty" because of the circumstances surrounding the detention and its limited nature. *Id.* at 701-03.

b. Petitioner's professed concerns regarding the constitutional protections available to vehicle passengers also fail to justify his position. Passengers in vehicles stopped by police in a routine manner would not be without constitutional protections simply because the stop itself does not implicate their Fourth Amendment rights. Once the officer either by word or deed directs action at the passenger in some way, the passenger's Fourth Amendment rights may be implicated. But the routine stopping of the vehicle *without more* is not a "seizure" of a passenger.

If a "seizure" indeed occurs as a consequence of police action directed at the passenger after the stop, the passenger will of course be able to challenge whether it was reasonable. In assessing that, a court may be required to consider the "totality of the circumstances." *Wilson*, 519 U.S. at 411. Those circumstances could include the stop of the vehicle itself. As noted earlier, the Court in *Wilson* held that an officer's order to a passenger to exit a vehicle is reasonable under the Fourth Amendment as a matter of course based upon officer-safety concerns where the stop of the car was *lawful*. *Id.* at 410. Thus, a seized passenger well might litigate the lawfulness of the stop indirectly where police action directed at him implicated his own personal Fourth Amendment rights. That is very different, however, from saying that a passenger may challenge a vehicle stop on the theory that his own Fourth Amendment rights were implicated merely by the stopping of the vehicle. Cf. *Michigan* v. *Summers*, 452 U.S. at 694-95 (Summers could challenge his detention but not the probable cause supporting the search warrant being executed when he was detained). Here, of course—as explained below, see pp. 34-35, *post*—petitioner's arrest was independently justified and "reasonable" based upon the valid arrest warrant. So, he would be unable to litigate the lawfulness of the stop.

Passengers retain other protections too. Under *New York* v. *Belton*, 453 U.S. 454, 460-61 (1981), neither the passenger nor his belongings may be searched during the stop without lawfully-acquired cause justifying an arrest or a search. See *Wyoming* v. *Houghton*, 526 U.S. 295, 302 (1999). In addition, as noted just last Term in *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2168 (2006), the increasing professionalism of police departments will serve to deter

police officers from stopping vehicles wholly without justification. Moreover, the threat of a 42 U.S.C. § 1983 civil rights action by the driver deters police officers from unlawfully stopping cars on the road. See *id.* at 67-68. Finally, the American Civil Liberties Union's stated concern about possible discriminatory use of traffic stops, see ACLU Br. 12-23, is best answered by *Whren* v. *United States*, 517 U.S. 806. There, the Court reaffirmed that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause not the Fourth Amendment." *Id.* at 813.

c. Petitioner suggests that the Fourth Amendment exclusionary rule itself provides a reason for "[p]ermitting a passenger to move to suppress the fruits of an unreasonable traffic stop." Petr.'s Br. 26. But it is a violation of the Fourth Amendment that results in application of the exclusionary rule: the rule does not define a constitutional claim. "The sole office of the exclusionary rule . . . is to prevent the admission of evidence at trial, not to define constitutional rights or violations." *Reich* v. *Minnicus*, 886 F.Supp. 674, 681-82 (S.D. Ind. 1993).

Fourth Amendment rights are personal, *Rakas* v. *Illinois*, 439 U.S. 128, 138-39 (1978): under a given set of facts, a person is either "seized" in the constitutional sense or he is not. A passenger cannot be permitted "to move to suppress the fruits of an unreasonable traffic stop" simply because it might further the aims of the exclusionary rule itself. "Whether the exclusionary sanction is appropriately imposed in a particular case, . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States* v. *Leon*, 468 U.S. 897, 906 (1984)

quoting *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983)); accord, *Hudson* v. *Michigan*, 126 S. Ct. at 2164.

Application of the exclusionary rule requires that there was "evidence obtained in violation of the Fourth Amendment." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348. If petitioner was not detained as a passenger in a routine traffic stop of the driver, then his Fourth Amendment rights were not implicated. The exclusionary rule does not provide an independent means of permitting him "to move to suppress the fruits" of the stop of the driver.

d. Petitioner asserts, improbably, that driver Simeroth acted as Deputy Brokenbrough's "agent" in "seizing" him as if in a container. Petr.'s Br. 20-21. But stopping a car is different from seizing it. See *Illinois* v. *Caballes*, 543 U.S. 405, 409 (2005). The deputy certainly did not seize the car as evidence or as an instrumentality of a crime. Moreover, people are not "effects" under the Fourth Amendment. Cf. *United States* v. *Jacobsen*, 466 U.S. 109, 114 (1984) (parcels are "effects in which the public at large has a legitimate expectation of privacy"). People may say no to an officer, or they may otherwise avoid or terminate any mere contact with an officer. Anyway, Simeroth was the object of Deputy Brokenbrough's police action, not his civilian agent.

E. Petitioner Was Not "Seized" Until The Officer Ordered Him Out Of The Vehicle At Gunpoint And Arrested Him Under The Outstanding Warrant; As That Arrest Was Lawful, Evidence Obtained Incident To That Arrest Was Not Subject To Suppression

Petitioner was not detained by the stopping of the car. His subsequent detention and the discovery of the challenged evidence were entirely proper.

As a passenger, petitioner's rights under the Fourth Amendment were not implicated by the search of his co-defendant's vehicle. *Rakas* v. *Illinois*, 439 U.S. 128 at 134. Therefore, he cannot complain about the items seized therein. Moreover, evidence from petitioner's person was discovered properly in a search incident to his arrest on a valid warrant. See *United States* v. *Robinson*, 414 U.S. 218, 225-27 (1973). Petitioner, indeed, has not suggested that the arrest was unlawful. His lawful arrest also gave the officers the right to search the passenger compartment of the vehicle in which he was riding and any containers found therein. *New York* v. *Belton,* 453 U.S. at 460-61.

No evidence suggests that petitioner was detained prior to that point. Deputy Brokenbrough merely exited his vehicle and approached the driver. His only contact with petitioner, prior to the arrest, was to ask him his name. After the vehicle was initially stopped, and until probable cause developed, petitioner was not physically restrained by Deputy Brokenbrough. Until the deputy had established probable cause to arrest petitioner, there was no application of force, no intimidating police conduct, no overwhelming show of force, and no brandishing of weapons. See *Drayton*, 536 U.S. at 204. The deputy's use

of the spotlight to illuminate the nighttime scene was natural and innocuous.

Nor did the deputy engage in any show of authority that would lead a reasonable, innocent person to believe he was not free to go or otherwise avoid the officer. See *Bostick*, 501 U.S. at 436-39. No weapons were brandished, no commands issued, and no exits were blocked. In fact, petitioner had opened the passenger door at one point before apparently deciding to remain in the vehicle. (JA 38-39.) None of the officer's actions prior to the arrest of petitioner would have suggested to a reasonable, innocent passenger that this was anything other than a routine-manner traffic stop.

Further, the time frame was short. After stopping the vehicle, Deputy Brokenbrough immediately made contact with the occupants. Upon recognizing petitioner, he immediately checked with dispatch and, within three minutes from the initial stop, he determined that petitioner was a parolee subject to an arrest warrant. (JA 39.) Only at this point did Deputy Brokenbrough order petitioner out of the car with a show of force that would have left a reasonable person feeling compelled to submit to the officer's authority. When petitioner submitted to this show of authority, he was "seized" within the meaning of the Fourth Amendment. *Hodari D.*, 499 U.S. at 626. Until then, petitioner was—absent some directive that resulted in his "seizure"—free to go.[5]

---

[5] Petitioner and Amici The National Association of Criminal Defense Lawyers (NACDL) disagree with the notion that, absent some directive from the officer, a passenger like petitioner is free to go once the car is stopped. They assert that, because many courts have extended this Court's holding in *Wilson* to find that officers *may* fully

(Continued on following page)

The fact that petitioner chose to remain does not demonstrate that the police coerced or compelled him to do so. After all, the reasonable, innocent passenger may not want to leave the vehicle for a variety of reasons. See *Bostick*, 501 U.S. at 436. Moreover, a person need not leave the scene in order to avoid the police and go about his business. Petitioner's business was, prior to the stop, in the car. Petitioner, or the reasonable innocent passenger could have gone about his business by remaining in the car. "After all an individual may manifest an unwillingness to engage with the police not only by departing the area, but also by staying put and declining to answer questions or otherwise ignoring police inquiries." *Brendlin*, 136 P.3d at 852. (JA 126-27.) It was, however, this element of choice that distinguished petitioner at this time from Ms. Simeroth who was not free to go. See *Jackson*, 29 P.3d at 1185. Thus, until the time of his arrest, petitioner's encounter with the deputy after the actual stop of the vehicle was consensual and did not implicate the Fourth Amendment. See *Bostick*, 501 U.S. at 434.

---

control the movements of passengers either by ordering them to remain in the car or by keeping them at the scene, passengers therefore are, in fact, "seized." Petr.'s Br. 7; NACDL Br. 12-14. While those courts were correct in extending the *Wilson* holding to permit full control by the officer as a matter of course after a lawful routine traffic stop, see *United States* v. *Williams*, 419 F.3d 1029, 1030-31 (9th Cir. 2005), it does not follow that, because of this authority, a passenger is automatically "seized." See generally, *Michigan* v. *Summers*, 452 U.S. at 702-03 ("the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation"; however, a detention does not occur until the officers exercise that control.) The passenger is not "seized" merely because the officer possesses the power to "seize" him. See *Brendlin*, 136 P.3d at 854. (JA 130.)

II. Even If Petitioner Were Unreasonably Seized Solely On Account Of The Traffic Stop, The Evidence Obtained At The Scene Would Not Be Subject To Suppression

In any event, the challenged evidence in this case was admissible. This Court has consistently rejected a rule that would require the suppression of evidence merely because there was a connection between the discovery of the evidence and a violation of the Fourth Amendment. As this Court stated in *United States* v. *Leon*, "[w]e have declined to adopt a per se or 'but for' rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest." 468 U.S. at 910-11; See also *Hudson* v. *Michigan*, 126 S. Ct. at 2164; *United States* v. *Ceccolini*, 435 U.S. 268, 274-75 (1978); *Wong Sun* v. *United States*, 371 U.S. at 481, 487-88 (1963). The exclusion of evidence somehow connected with a Fourth Amendment violation requires at a minimum a causal connection between the illegal conduct and the evidence sought to be suppressed: mere physical causation is not enough. Once a connection between the evidence and the illegality has been established, the court still must examine the closeness of the connection to determine whether the evidence may be admissible. The test is whether "the chain of causation proceeding from the unlawful conduct has been so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States* v. *Crews*, 445 U.S. 463, 471 (1980).

In *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975), this Court set forth factors to consider in determining whether the "taint" of a primary illegality has been sufficiently

attenuated: (1) the time between the illegal police conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police misconduct. Here, two factors dilute any taint. First is the significant intervening factor of petitioner's arrest under a valid pre-existing warrant. Unlike other situations involving allegedly intervening factors, the arrest of petitioner was not the result of the situation created by the original police illegality. See *id.* at 603-05. Rather, the arrest was the result of prior conduct by petitioner giving rise to the warrant.

Moreover, the police misconduct, if any, in detaining petitioner was not flagrant. The officer did not know who petitioner was when he stopped the car, and the stop was nonviolent and brief. When taken together, the intervening fact of petitioner's arrest and the lack of flagrancy in the officer's conduct in detaining petitioner are more than sufficient to attenuate any taint of the evidence obtained from the allegedly unlawful detention. See *United States* v. *Simpson*, 439 F.3d 490, 495 (8th Cir. 2006) (where "outstanding arrest warrant constitutes extraordinary intervening circumstances that purges much of the taint."); *United States* v. *Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("It would be startling to suggest that because the police illegally stopped an automobile they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'"); *State* v. *Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006); *State* v. *Page*, 103 P.3d 454, 455 (Idaho 2004); *State* v. *Jones*, 17 P.3d 359, 361 (Kan. 2001); *State* v. *Hill*, 725 So. 2d 1282, 1286 (La. 1998).

It is true that, in petitioner's case, the evidence was discovered close in time to the allegedly unlawful

"passenger detention." But this case is unlike one where the proffered intervening act, such as a defendant's inculpatory statement or his consent to search, well might be the product of coercive police action in the carrying out of the detention or initial illegality. See *United States* v. *Green*, 111 F.3d at 522. Here, the separate intervening act of an arrest pursuant to a pre-existing warrant cannot be linked to any coercive police action.

Thus, even if petitioner had been unlawfully detained by the stop of the vehicle, the evidence obtained against him was not subject to suppression. It was not the tainted "fruit" of a "poisonous tree." See *Wong Sun* v. *United States*, 371 U.S. at 487.

* * *

In sum, petitioner was merely a passenger in a vehicle that was stopped in a routine manner by the police to investigate a traffic infraction.[6] That stop occurred as a result of the driver's submission to the officer's show of authority. During the driver's submission, nothing in the officer's actions would have coerced or compelled a reasonable passenger to do anything. It was the driver, not petitioner, who submitted to the officer's command to stop the car. Aside from opening the car door at one point, petitioner merely remained where he had started, sitting in his front passenger seat.

---

[6] The fact that the stop was later determined to be unjustified does not alter the conclusion that the manner of the police action in the stop itself was routine. It is the police action as it appeared at the time it occurred and not the later judicial determination of its propriety that is the relevant consideration. See *Hodari D.*, 499 U.S. at 627 n.3 (noting fundamental distinction between what action constitutes a "seizure" and whether there is acceptable justification for that "seizure").

Petitioner therefore was not "seized" within the meaning of the Fourth Amendment by the stopping of the car. As his own personal Fourth Amendment rights were not implicated by the stop, petitioner may not challenge whether the stop was reasonable. See *Rakas*, 439 U.S. at 133-34.

In any event, the discovery of the incriminating evidence was attenuated from the challenged stop. Instead, the discovery flowed from the search incident to petitioner's arrest under the pre-existing arrest warrant. The California Supreme Court correctly ruled that the exclusionary rule was inapplicable.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor
MICHAEL A. CANZONERI
Supervising Deputy Attorney General
DORIS A. CALANDRA
Deputy Attorney General

CLIFFORD E. ZALL
Deputy Attorney General
Counsel of Record

Counsel for Respondent

Dated: April 9, 2007

259

25 pgs

(8)

No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
RICHARD A. KAPLAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ELIZABETH CAMPBELL*
2407 J Street
Suite 301
Sacramento, CA 95816
(916) 441-3792

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

April 16, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER	1
I. THIS COURT SHOULD DECLINE RESPONDENT'S INVITATION TO "EXTEND" THE COURT'S PRECEDENTS TO FOCUS EXCLUSIVELY ON THE SUBJECTIVE INTENT OF THE DETAINING OFFICER	1
II. *BOSTICK* AND *HODARI D.* ARE INAPPOSITE IN THE CONTEXT OF AN OCCUPANT OF A VEHICLE THAT HAS BEEN PULLED OVER BY AN OFFICER'S SHOW OF AUTHORITY	9
III. THE DIRECT AND UNATTENUATED RELATIONSHIP BETWEEN THE CONCEDEDLY UNLAWFUL STOP AND THE EVIDENCE OBTAINED DICTATES THAT SUPPRESSION OF THE EVIDENCE IS REQUIRED	14
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Alderman v. *United States*, 394 U.S. 165 (1969).... 6
Barry v. *New Jersey*, 454 U.S. 1017 (1981)..... 20
Berkemer v. *McCarty*, 468 U.S. 420 (1984) 10
Brower v. *City of Inyo*, 489 U.S. 593 (1989) .. 2, 3, 4, 13
Brown v. *Illinois*, 422 U.S. 590 (1975) 14, 15, 16
California v. *Hodari D.*, 499 U.S. 621 (1991)..... 5, 10, 12
County of Sacramento v. *Lewis*, 523 U.S. 833 (1998)..... 3, 4
Delaware v. *Prouse*, 440 U.S. 648 (1979)..... 4, 10, 19
Florida v. *Bostick*, 501 U.S. 429 (1991) 5, 9
Hudson v. *Michigan*, 126 S. Ct. 2159 (2006)..... 14, 15
Jones v. *United States*, 362 U.S. 257 (1960)..... 5
Kaupp v. *Texas*, 538 U.S. 626 (2003) 15
Maryland v. *Wilson*, 519 U.S. 408 (1997) 2, 11, 12
Mosby v. *Senkowski*, 470 F.3d 515 (2d Cir. 2006).. 17
People v. *Brendlin*, 136 P.3d 845 (Cal. 2006) 11
Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983) 16
Rakas v. *Illinois*, 439 U.S. 128 (1978) 4, 5, 6, 7
Rawlings v. *Kentucky*, 448 U.S. 98 (1980) 18
Taylor v. *Alabama*, 457 U.S. 687 (1982) 16
Terry v. *Ohio*, 392 U.S. 1 (1968) 18
United States v. *Arvizu*, 534 U.S. 266 (2002) 18
United States v. *Bailey*, 691 F.2d 1009 (11th Cir. 1982)..... 17, 18
United States v. *Dawdy*, 46 F.3d 1427 (8th Cir. 1995)..... 17, 18
United States v. *Green*, 111 F.3d 515 (7th Cir. 1997)..... 17
United States v. *Nooks*, 446 F.2d 1283 (5th Cir. 1971)..... 17
Whren v. *United States*, 517 U.S. 806 (1996)..... 19
Wong Sun v. *United States*, 371 U.S. 471 (1963)... 15

TABLE OF AUTHORITIES – continued

STATUTES	Page
42 U.S.C. § 1983 (1979)	2
Cal. Veh. Code § 21712(b) (2007)	8
§ 23111 (2007)	8
§ 23112(a) (2007)	8
§ 23116(b) (2007)	8
§ 23221(b) (2007)	8
§ 23223(b) (2007)	8
§ 23224(b) (2007)	8
§ 23226(b) (2007)	8
§ 23226(b) (2007)	8
§ 27315(e) (2007)	8
§ 2800 (2007)	10
§ 2800.1 (2007)	10

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004)	3

REPLY BRIEF FOR THE PETITIONER

Respondent's arguments in defense of the California Supreme Court's novel and result-driven test for seizure rely upon untenable extensions and unsupported reconstructions of this Court's precedents. First, Respondent reads *Brower* v. *County of Inyo* to suggest that only the singular "object" of the officer's show of authority (which Respondent assumes to be the driver in all cases) is seized. Second, Respondent uses *Florida* v. *Bostick* and *California* v. *Hodari D.* – two cases that expressly turn on the *absence* of either acquiescence to or the existence of an officer's "show of authority" and a resulting deprivation of liberty and privacy interests – to argue that Petitioner was not seized when the Deputy Sheriff pulled over the car in which Petitioner was riding. Finally, Respondent would vitiate the Court's holding in *Hudson* v. *Michigan* in order to argue yet another novel proposition of law; namely, that an unlawful seizure is, in all cases, of no moment where the person seized is subject to arrest on an outstanding warrant.

None of Respondent's multiple fallback positions or novel constructions of this Court's precedents are consistent with established principles of Fourth Amendment law or even sound policy. For this reason, and others left unaddressed by Respondent, the Court should reject Respondent's arguments and vacate the California Supreme Court's decision.

I. THIS COURT SHOULD DECLINE RESPONDENT'S INVITATION TO "EXTEND" THE COURT'S PRECEDENTS TO FOCUS EXCLUSIVELY ON THE SUBJECTIVE INTENT OF THE DETAINING OFFICER.

1. For the Court to find in Respondent's favor, it must conclude, *inter alia*, that despite police conduct resulting in the actual detention of multiple individuals, only the individual targeted by a police officer may be considered "seized" for Fourth Amendment purposes. Respondent

expressly asks the Court to "extend[]" the holding of *Brower* v. *City of Inyo*, 489 U.S. 593 (1989), from a requirement that government action must be purposeful in order to constitute a seizure (*i.e.*, the officer must intend to do the act leading to the detention) to one that mandates that a seizure occurs only when the specific person whom the officer seeks to apprehend is detained. See Resp. Br. 11. This requested extension not only far exceeds any of this Court's related decisions on the matter,[1] but also runs counter to much of this Court's Fourth Amendment jurisprudence and makes little sense as a matter of practice.

First, *Brower* is an inappropriate springboard for Respondent's position. In *Brower*, the petitioner's decedent in a civil action under 42 U.S.C. § 1983 (1979) died as a result of a roadblock set up to impede his further progress during a police pursuit. This Court held that as a result of the collision, the deceased driver was "seized" within the meaning of the Fourth Amendment. *Brower*, 489 U.S. at 599. In so holding, the Court asserted that "a Fourth Amendment seizure" occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Id.* at 596-97 (emphasis in original). Respondent claims that based on *Brower*, it "makes sense to recognize that a 'seizure' requires not merely that the police conduct is undertaken deliberately but also that it is directed at a particular person." Resp. Br. 12. For support, Respondent cites a passage in which the Court states that "'[i]t was enough therefore, that . . . Brower was meant to be stopped by the physical obstacle of the roadblock and that he was so stopped.'" *Id.* (quoting *Brower*, 489 U.S. at 599). Respondent reads this statement with emphasis on "Brower"

---

[1] *See* Pet. Br. 10-13. The only support from this Court that Respondent can muster for its position (without seeking an "extension" of the Court's Fourth Amendment doctrine) comes from a dissenting opinion in *Maryland* v. *Wilson*, 519 U.S. 408, 420 (1997) (Stevens, J., dissenting). *See* Resp. Br. 13, 14, 20, 29.

rather than "meant to be stopped." But *Brower*'s analysis concerned whether the police officers' actions as a general matter were purposeful, distinguishing them from a situation where an individual's freedom of movement is restricted accidentally.[2] See, *e.g.*, *County of Sacramento* v. *Lewis*, 523 U.S. 833, 844 (1998) (police car inadvertently struck passenger on motorcycle who had fallen off during high-speed chase). Thus *Brower* offers no comment about the relevance, if any, of *who* specifically was the target of the roadblock and it defies logic to suggest, as Respondent's position necessarily does, that a passenger in Brower's vehicle would not also have been seized and therefore would have had no predicate for a § 1983 action.

Respondent's misconstruction of the *Brower* rationale is underscored by the holding in *County of Sacramento* v. *Lewis*, in which this Court applied the test from *Brower* to reach the opposite conclusion. In *Brower*, the Court found that a detention had occurred because the driver had in fact been stopped by the very instrumentality put in place to detain him. 489 U.S. at 596. In *Lewis*, by contrast, the Court found that no seizure occurred when an officer pursuing a fleeing motorcycle accidentally ran over a passenger who had fallen off the back of the motorcycle. *Lewis*, 523 U.S. at 844. This determination was not, however, based on the fact that the officer's show of authority was directed at the driver and it

---

[2] Respondent mistakenly equates "incidental" interferences with liberty with those that are "accidental." *See* Resp. Br. 12. According to Respondent, both are simply "'unintended consequence[s] of government action.'" *Id.* (quoting *Brower*, 489 U.S. at 596). This understanding is erroneous, however, as incidental intrusions are often anticipated (*i.e.*, intended), while accidental intrusions are, by definition, "[n]ot . . . purposeful." *Black's Law Dictionary* 16 (8th ed. 2004). Thus, for purposes of determining whether a seizure has occurred, it is of no moment that an intrusion – in this case a restriction on an individual's personal liberty – may be deemed "incidental"; unlike most accidental intrusions, *see, e.g.*, *County of Sacramento* v. *Lewis*, 523 U.S. 833, 844 (1998), an incidental intrusion retains its character as a seizure.

was a passenger rather than a driver who was struck by the officer, but rather on the fact that the officer had not terminated the passenger's movement by "means intentionally applied." *Id.* As the Court explained in *Brower*, it is the police *action* that must be intentional; a seizure may occur even when an unintended person or thing is the subject of the detention, but no seizure will occur unless the detention is the result of intentional police conduct. 489 U.S. at 596.

Second, Respondent's hypotheticals do not support its desired extension of the holding in *Brower*. Respondent asserts that Petitioner's position – that a passenger is seized when pulled over by the police – logically implies that a seizure also occurs where a police officer stops one car on a one-lane road, but also therefore interferes with the movement of a second car trailing the stop. Resp. Br. 8. This suggestion highlights Respondent's fundamental misunderstanding of Petitioner's position and the state of the law. When a car has been pulled over, all of the occupants are now subject – at one level or another – to the authority of the police officer and to other, important operations of law. Pet. Br. 24-26. The stopped car behind them, by contrast, may be inconvenienced, but its occupants are subject only to the intrusion of not being able to go forward. Unlike the occupants in the car seized, however, the idle occupants of the following car are not subject to any examination or scrutiny by the police, and thus their "sense of security and privacy in traveling in an automobile," *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979), is in no way compromised.

Third, although Respondent appears to extrapolate its recommended standard from *Brower*, the test bears a striking resemblance to the "target theory" rejected by this Court in *Rakas* v. *Illinois*, 439 U.S. 128, 132-33 (1978). The "target theory" or "object" theory, as Respondent describes it, see Resp. Br. 9, 12, looks to whether the aggrieved party was the object of the attempted seizure to determine whether his or her Fourth Amendment rights have been implicated at all.

Such a theory focuses on the subjective intentions of the officers rather than on the objective observations and impressions of the person claiming a violation of Fourth Amendment rights. Nowhere in this Court's cases addressing the "reasonable person" standard of Fourth Amendment seizures is there any indication that the officer's intent to cause a reasonable person to believe that he or she is not free to terminate the encounter is even relevant to the discussion. On the contrary, the Court has emphasized that the inquiry is an objective one and focuses solely on the potentially aggrieved party; a seizure occurs when a reasonable person would not feel free "to disregard the police and go about his business," *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), or when a reasonable person would not "feel free to decline the officers' requests or otherwise terminate the encounter." *Florida* v. *Bostick*, 501 U.S. 429, 436 (1991).

In *Rakas*, the defendants were passengers in a car that was lawfully stopped by police. The defendants sought to suppress evidence seized during an allegedly unreasonable search of the vehicle on the ground that they were "targets" of the search. The Court rejected the defendants' proposed rule of Fourth Amendment "standing," a rule that would permit any criminal defendant at whom a search was "directed" to challenge that search. *Rakas*, 439 U.S. at 132. In rejecting this so-called "target theory," the Court noted its earlier statement in *Jones* v. *United States*:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

362 U.S. 257, 261 (1960). The *Rakas* court clarified, however, that the "directed" language in *Jones* merely served as a "parenthetical equivalent" to the phrase "a victim of a

search or seizure." *Rakas*, 439 U.S. at 135. The Court went on to explicitly disavow any broader reading of the term. *Id.* Thus, just as the Court in *Rakas* rejected the "target theory" to the extent that it would broaden the rights of those seeking to suppress seized evidence, this Court should reject Respondent's attempt to revive that doctrine in this case in order to narrow the rights of those who, unlike Petitioners in *Rakas*, are unlawfully seized.

The "target" or "object" doctrine has also been foreclosed by this Court on a number of occasions beyond *Rakas*, dating back to *Alderman* v. *United States*, 394 U.S. 165 (1969). In *Alderman*, this Court determined that an absent party had "standing" to object to the use of electronic surveillance conducted inside his home, whether or not he was present at the time of the surveillance or participated in the intercepted conversations. The *Alderman* decision included the same "directed at" language used by the Court earlier in *Jones,* but in *Alderman* the Court made clear that the "directed at" rationale meant simply that the person seeking to exclude evidence have experienced an invasion of his or her privacy. *Id.* at 173-74. Although the Court once again declined to adopt a broad rule that would permit any party to exclude illegally seized evidence regardless of whether that party's personal constitutional rights were violated by the search, the Court emphasized the "substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion." *Id.* at 174. In other words, the crucial question is whether the party seeking to suppress evidence was subjected to an illegal search or detention, not whether that party was the "object" of the police action. Cf. *id.* at 176-77.

Although the context in *Alderman* is quite different from the one in this case, the Court's review of *Alderman* in *Rakas* reveals the flaws in Respondent's proffered approach to

determining when a person has been seized under the Fourth Amendment. Specifically, the *Rakas* Court quoted with approval the concurring and dissenting opinion of Justice Harlan, which addressed in some detail the difficulties presented by the proposed "target theory":

> [The] [target] rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was motivated by an effort to obtain information against the accused or some other individual.

Rakas, 439 U.S. at 136-37 (quoting *Alderman*, 394 U.S. at 188-89 n.1 (Harlan, J., concurring in part and dissenting in part)) (alteration in *Rakas*). The very same concern applies in this context. In order to determine whether a passenger's Fourth Amendment rights have been implicated by a traffic stop, Respondent's approach would require an examination of the officer's subjective intentions in stopping the vehicle, his awareness of the passenger's presence, and what role the passenger's actions played in the officer's decision to stop the car. Such an approach would represent a complete break from this Court's consistent emphasis on applying a strictly objective standard to determine when a seizure has occurred.

2. Even beyond the relevant case law, as a practical matter when an officer signals to the driver of a car to pull to the side of the road, neither the driver nor the occupants knows at that moment who or what is the object of the officer's suspicion.[3]

---

[3] In fact, it may be unclear to the officer herself who is responsible for the apparent violation.

Here, for example, the Deputy could have spotted Petitioner in the passenger's seat, recognized him as the subject of an outstanding warrant, and then pulled over the car. From this perspective, each of the vehicle's occupants is potentially the object of the officer's authority.

Similarly, even if the officer has targeted a passenger for an alleged violation, there is simply no way the officer could seize only that passenger.[4] It is unclear exactly how Respondent would analyze this highly plausible scenario. Is

---

[4] Respondent's claim that "there is no reason for anyone present to assume that the initial police action is directed at anyone other than the driver," Resp. Br. 19, flies in the face of California law itself. Police may effect a traffic stop based solely upon the conduct of a *passenger*. California's vehicle code is replete with laws directed at either the driver or the passenger. *See, e.g.*, Cal. Veh. Code § 21712(b) (2007) ("A person shall not ride on a vehicle or upon a portion of a vehicle that is not designed or intended for the use of passengers."); § 23111 ("No person in any vehicle . . . shall throw or discharge from or upon any road or highway or adjoining area, public or private, any lighted or nonlighted cigarette, cigar, match, or any flaming or glowing substance."); § 23112(a) ("No person shall throw or deposit... upon any highway . . . any substance likely to injure or damage traffic using the highway, or any noisome, nauseous, or offensive matter of any kind."); § 23116(b) ("No person shall ride in or on the back of a truck or flatbed motortruck being driven on a highway."); § 23221(b) ("No passenger shall drink any alcoholic beverage while in a motor vehicle upon a highway."); § 23223(b) ("No passenger shall have in his or her possession, while in a motor vehicle upon a highway or on lands . . . any bottle, can, or other receptacle containing any alcoholic beverage that has been opened or a seal broken, or the contents of which have been partially removed."); § 23224(b) ("No passenger in any motor vehicle who is under the age of 21 years shall knowingly possess or have under that person's control any alcoholic beverage."); § 23226(b) ("It is unlawful for any passenger to keep in the passenger compartment of a motor vehicle, when the vehicle is upon any highway . . . any bottle, can, or other receptacle containing any alcoholic beverage that has been opened or a seal broken, or the contents of which have been partially removed."); § 27315(e) ("A person 16 years of age or over may not be a passenger in a motor vehicle on a highway unless that person is properly restrained by a safety belt.").

only the passenger seized despite the officer's signal to the driver to pull off the road? Are both the driver and targeted passenger seized, but for different purposes? These ambiguities in Respondent's theory demonstrate its ultimate unsoundness. In sum, the most appropriate and practical view is that both the driver and any passengers are seized when subject to the authority of a police officer during a traffic stop.

II. *BOSTICK* AND *HODARI D.* ARE INAPPOSITE IN THE CONTEXT OF AN OCCUPANT OF A VEHICLE THAT HAS BEEN PULLED OVER BY AN OFFICER'S SHOW OF AUTHORITY.

1. Respondent's attempt to analogize this case to *Florida* v. *Bostick* is unavailing. *Bostick* concerned the claim of a passenger on an idle commercial bus that he was "seized" as a result of the actions of two county police officers who boarded the bus in order to obtain passengers' consent to search luggage in the course of an illegal drug investigation. For several reasons, *Bostick* does not apply to the facts of this case. Most notably, *Bostick* "did not present a situation in which the individual's 'freedom of action' had been curtailed in the first place."[5] Pet. Br. 23. In other words, whereas in *Bostick* the defendant passenger was simply waiting on an idle bus that had yet to depart, here Petitioner's vehicle was physically pulled over by the police in the course of transit. The result is that in this case, Petitioner was seized at the moment he was pulled over, while the passenger in *Bostick* was never so detained (and in fact was informed that he was free to decline the officers' requests for cooperation, see *Bostick*, 501 U.S. at 432).

---

[5] *Bostick* is distinguishable for the additional reason that the Court found that the officers boarded such buses on a regular basis and did not act in a threatening manner. 501 U.S. at 431-32. Respondent in *Bostick* did not therefore acquiesce to a show of authority, only to an officer's request.

In challenging this argument, Respondent claims that the Deputy did not use "force to impede a citizen's movements." Resp. Br. 22. Respondent bases this contention on an irrelevant distinction drawn in *Brower* between police pursuit by flashing lights and the use of a roadblock. See *id.* (citing *Brower*, 489 U.S. at 598). There the Court stated: "In marked contrast to a police car pursuing with flashing lights or to a policeman in the road signaling an oncoming car to halt, a roadblock is not just a *significant show of authority* to induce a voluntary stop." *Id.* (citing *Brower*, 489 U.S. at 598) (emphasis in Resp. Br.) But the reference to a "significant show of authority" was merely to the *pursuit* undertaken by a police officer, and not an instance where the pursued vehicle in fact pulls over as a result of that show of authority (as happened here). The cited passage merely confirmed what is now well-established law, namely that pursuit alone does not constitute a seizure (*i.e.*, pursuit is not the equivalent of impeding a citizen's movements). See *Hodari D.*, 499 U.S. at 628-29.

Moreover, in this case, the Deputy testified that in order to effectuate the traffic stop, he turned on his overhead lights and kept them on for the duration of the stop. JA 50. This Court has consistently held that stopping an automobile constitutes a seizure within the meaning of the Fourth Amendment, no matter how limited the purposes of the stop or how brief the duration of the detention. *Prouse*, 440 U.S. at 653. The Court has also acknowledged that "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Berkemer* v. *McCarty*, 468 U.S. 420, 436 (1984). Indeed, as Respondent acknowledges, the California Vehicle Code makes it a crime to ignore an officer's signal to pull over. Resp. Br. 19; Cal. Veh. Code §§ 2800 (2006), 2800.1 (2007). Under no reasonable interpretation of the facts may this unjustified traffic stop be likened to a "consensual" police encounter.

While it is true that both *Bostick* and the case at bar involve – to some degree – modes of transportation, the defendant's presence on a bus in *Bostick* was irrelevant because the bus was stationary and had not yet begun its journey. Thus, when the officers initially boarded the bus to question the passengers, there was a genuine question as to whether a reasonable person in the defendant's position would have felt free to leave. He had yet to be subjected necessarily to a sufficient show of authority. This circumstance in no way resembles the current situation, where the officer's show of authority required – under California law – the occupants in the vehicle to cease their journey.

Like the California Supreme Court in its opinion below, Respondent posits a slippery slope in which a finding that Petitioner was detained in this case would lead to a conclusion that "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by police for running a red light." Resp. Br. 23; see also *People* v. *Brendlin*, 136 P.3d 845, 850-51 (Cal. 2006) (JA 121-25). This hypothetical is unpersuasive for three reasons.[6] First, passengers of a common carrier – such as a bus or taxi – pulled over by the police are generally not in a relationship to the driver (or perhaps even to another passenger sought by the police) analogous to that of passengers and drivers in a private vehicle. As a result, it is far less likely in the common carrier context that the passengers are either a threat to officer safety or related in any way to the potentially unlawful behavior at issue. Cf. *Maryland* v. *Wilson*, 519 U.S. 408, 413-14 (1997). Second, and not unrelated, a passenger riding in a bus or taxi stopped by police based on driver conduct is not subject to the same

---

[6] Significantly, under the circumstances described by Respondent (running a red light), any detention of bus or taxi passengers would undoubtedly be a reasonable detention because the traffic stop would be supported by probable cause to believe that the driver had violated the law. The Fourth Amendment does not prohibit reasonable seizures.

level of police scrutiny nor to the same overall constraint on liberty as a passenger in a private automobile stopped under the same circumstances. See Pet. Br. 25-26; cf. *Wilson*, 519 U.S. at 413-15. Third, whereas an occupant in a private vehicle – given the individual's likely relationship to the driver – would certainly not feel free to leave the vehicle when stopped, a reasonable passenger on a common carrier who has no relation to the driver is certainly more likely to feel free to leave the scene and find an alternate route. Thus, there exists constitutionally and factually significant differences between a passenger stopped in a common carrier such as a bus or a taxi and passengers traveling in a private automobile.

2. Respondent also makes much of *California* v. *Hodari D.*, although that case too has no relevance here.[7] In *Hodari D.*, the defendant attempted to suppress evidence he discarded while fleeing the police, on the ground that he was subjected to an unreasonable seizure under the Fourth Amendment. This Court addressed the "narrow question" of whether "with respect to a show of authority . . . a seizure occurs even though the subject does not yield." *Hodari D.*, 499 U.S. at 626. Thus, at issue was whether the defendant was "seized" while being pursued by the police. The Court held that because the defendant did not comply with the officer's command to halt, he was not seized until the officer actually stopped the defendant's movement.

According to Respondents, *Hodari D.* is applicable here because we cannot know how and whether Petitioner, the passenger, responded to the Deputy's show of authority. See Resp. Br. at 25 ("[Petitioner's] choice to remain [in the vehicle] says nothing about whether the police action had

---

[7] Unlike this case, *see* Pet. Br. 30, neither *Bostick* nor *Hodari D.* directly implicate concerns of officer safety. Respondent's brief nowhere contests Petitioner's argument that Respondent's position is contrary to this "weighty interest," *Wilson*, 519 U.S. at 413. *See* Pet. Br. 30.

compelled him to do so or whether he simply chose to remain where he had been, perhaps because it would be more convenient."). For example, Petitioner might have objected to pulling over, requested that the driver comply with the officer's show of authority and pull over, or perhaps even, hypothetically, "leap[t] from the car and immediately fled from the scene." *Id.* Under these circumstances, asserts Respondent, "[n]o one could reasonably argue that the passenger was 'seized' because she somehow had submitted to the show of authority." *Id.*

But the irrelevance of Petitioner's thoughts in the course of a traffic stop does not alter the reality that the direct cause of the interference with his liberty interests was the Deputy's show of authority in stopping the car. Nor is it sensible to suggest that a passenger who does *not* alight from the vehicle to continue on his or her way has not acquiesced to that show of authority, regardless of motive. In this respect, a passenger is no less an "object" of the officer's compulsion than the driver or the contents of the vehicle, even if the passenger is an unintended object. See *Brower*, 489 U.S. at 596. In essence, Respondent proposes a new rule for this Court, namely that a passenger can *never* "submit to a show of authority" when being pulled over by the police. See Resp. Br. at 24 ("It was not for petitioner to respond to the officer's show of authority in this case.").

Simply put, when a vehicle is pulled to the side of the road by a police officer, its occupants are detained. The subjective thoughts of the occupants or an express disagreement between the driver and passenger prior to pulling to the side of the road are of no consequence. As long as the passenger remains in the car, that individual has submitted to the officer's show of authority.

III. THE DIRECT AND UNATTENUATED RELATIONSHIP BETWEEN THE CONCEDEDLY UNLAWFUL STOP AND THE EVIDENCE OBTAINED DICTATES THAT SUPPRESSION OF THE EVIDENCE IS REQUIRED.

Despite Respondent's protestations to the contrary, see Resp. Br. 37-39; see also *Amicus* Br. in Supp. of Resp., Wayne County, Michigan at 3-10, because the Deputy exploited an unlawful detention that directly led to the seizure of evidence that otherwise would have gone undiscovered, the evidence must be suppressed. This result follows from this Court's analysis in *Hudson* v. *Michigan*, 126 S. Ct. 2159 (2006), which examined two factors in determining whether evidence obtained during an unlawful search or seizure should be suppressed. First is "the requirement of unattenuated causation," *id.* at 2165, under which the Court examines whether "the causal link between the constitutional violation and the discovery of the evidence is attenuated" or sufficiently direct. Pet. Br. 28. As part of this analysis, the Court considers whether "the interest protected by the constitutional guarantee that has been violated would [ ] be served by suppression of the evidence obtained." *Hudson*, 126 S. Ct. at 2164. Second, the Court weighs whether the "deterrence benefits" of excluding the evidence "outweigh its 'substantial social costs.'" *Id.* at 2165. From these two factors, it is clear that the Court should apply the exclusionary rule in a case such as this one, where the identification of Petitioner, the discovery of his parole status, and his subsequent arrest and search were all the *immediate and direct result* of the concededly unlawful traffic stop, and the deterrence benefits of excluding the evidence are clear and significant. Pet. Br. 27-28.

Rather than address *Hudson*'s multidimensional inquiry, however, Respondent instead focuses exclusively on the question of attenuation. It asserts that in order to determine "whether the 'taint' of primary illegality has been sufficiently

attenuated," the Court should look to three factors identified in *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975). Resp. Br. 37-38. According to Respondent, these three factors are: "(1) the time between the illegal police conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police misconduct." *Id.* at 38.

The attenuation factors enumerated in *Brown*, however, apply only to circumstances where unlawful seizures result in *confessions*. As the *Brown* Court stated, each of its factors is designed to determine "whether [a] *confession* is obtained by exploitation of an illegal arrest." *Brown*, 422 U.S. at 603 (emphasis added). Moreover, Respondent omitted mention of a fourth factor expressly incorporated into *Brown*'s analysis: whether and in what context the authorities issued a *Miranda* warning to the suspect.[8] See *id.* (calling *Miranda* warnings "an important factor" in the analysis); see also *Kaupp* v. *Texas*, 538 U.S. 626, 632-33 (2003) (whether a confession "was 'an act of free will [sufficient] to purge the primary taint of the unlawful invasion'" depends upon "observance of *Miranda*, 'the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct'"). Respondent's creative attempt to graft its selected portions of the *Brown* test onto the *Hudson* analysis should be rejected.

Brown's four-factor test stems primarily from *Wong Sun* v. *United States*, 371 U.S. 471, 486, 488 (1963), where the Court held that a statement following an illegal arrest must be suppressed as a "fruit" of the arrest unless it results from "an intervening independent act of a free will," and is

---

[8] Respondent also fails to discuss the other important attenuation factor identified in *Hudson* and noted above, whether "the interest protected by the constitutional guarantee that has been violated would [ ] be served by suppression of the evidence obtained." *Hudson*, 126 S. Ct. at 2164.

"sufficiently an act of free will to purge the primary taint of the unlawful invasion." Put differently, "the issue is whether the speaker has voluntarily chosen to make the later statement, uninfluenced by the fact that prior statements have been compelled." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 279 (1983). This analysis reflects a specific concern in the exclusionary rule context over the interplay between the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment right against compelled self-incrimination. See *Brown*, 422 U.S. at 601 (noting that while the two Amendments "may appear to coalesce[,] . . . . [t]he exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth"); see also *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982). For "even if . . . statements . . . [a]re found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." *Brown*, 422 U.S. at 601.

Ultimately, *Brown* was concerned with the effect of an unlawful arrest on the defendant's free will, *i.e.*, whether the arrest served as a cause in his decision to confess. In a case such as this one, where no confession is involved, however, the effect of the unlawful seizure upon the defendant's free will plays no role in the discovery of evidence in a search incident to arrest pursuant to an active warrant discovered during an illegal stop. The current scenario bears little resemblance to that of a defendant who confesses for reasons that may be attenuated from the illegality of the stop. In other words, a defendant's decision to confess – and thus the *potential* for events prior to that confession to serve as an intervening cause – has no parallel in a case like this one, where at issue is the acquisition of physical evidence in a search incident to arrest.

Even assuming, *arguendo*, that *Brown* applies outside of the confession context, the three factors identified by Respondent nevertheless weigh heavily in favor of

suppression. First, as Respondent concedes, "the evidence was discovered close in time to the allegedly unlawful passenger detention." Resp. Br. 38. Second, there were no "intervening circumstances" between the seizure and the search. Such intervening circumstances occur when, for example, the discovery of the evidence in question was wholly incidental and independent of the allegedly unlawful arrest. For example, in *Mosby* v. *Senkowski*, 470 F.3d 515, 522 (2d Cir. 2006), the Second Circuit found that an intervening circumstance occurred when, while police were arresting defendant, a passerby asked what was happening with "Florida." The association of the defendant with that nickname implicated defendant in an entirely separate crime than the one for which defendant was being arrested.

Some courts have asserted that the subsequent discovery of an active arrest warrant constitutes an intervening circumstance. For example, the Seventh Circuit has claimed that "[b]ecause the [subsequent] arrest [on the outstanding warrant] is lawful, a search incident to the arrest is also lawful." *United States* v. *Green*, 111 F.3d 515, 521 (7th Cir. 1997). The *Green* court recognized, however, that there was "no case law directly on point," but asserted that other cases "are closely analogous and support our conclusion." *Id.*

A closer look at the underlying cases noted by *Green* tell a different story. For example, in *United States* v. *Nooks*, 446 F.2d 1283 (5th Cir. 1971), the Fifth Circuit did not rely solely or even primarily on an active arrest warrant in holding that the nexus between the challenged search and the original arrest was "attenuated." Rather, the court relied on the fact that the defendant: "precipitately and forcibly attempted to escape from [the officer's] custody and fled driving at speeds up to 115 m.p.h."; "shot directly at [the officer]"; and had "two other men in the trunk of the automobile." *Id.* at 1287-88. The other two cases cited by *Green*, *United States* v. *Dawdy*, 46 F.3d 1427 (8th Cir. 1995), and *United States* v. *Bailey*, 691 F.2d 1009 (11th Cir. 1982), are similarly

inapposite. Both involved defendants who *resisted* arrests, and both found that their defiance "provided independent grounds for . . . arrest" thus rendering "the evidence discovered in the subsequent searches . . . admissible." *Dawdy*, 46 F.3d at 1431; see *Bailey*, 691 F.2d at 1018.

Not only are these cases distinguishable on the facts, but those divergent facts give rise to discrete policy concerns that do not arise in cases where the alleged intervening factor is limited to the discovery of an active warrant. As Petitioner previously pointed out, see Pet. Br. 30, if the evidence in Petitioner's case is permitted to be used by the State, officers would no longer have sufficient incentive to avoid unjustified stops and random checks of passengers in vehicles. Indeed, such a holding may encourage officers to pull vehicles over to check for passengers with outstanding warrants on a mere "hunch." See *Amici* Br. in Supp. of Pet'r, the American Civil Liberties Union at 12-13; cf. *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). Longstanding case law would otherwise prohibit such action, *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968), but Respondent's position would significantly undercut that prohibition. Officers could now be rewarded for pulling over vehicles with the exclusive purpose of inquiring whether any of the passengers had outstanding warrants. In contrast, no officer patrolling the streets would, for example, change his or her behavior as a result of the *Nooks*, *Dawdy*, or *Bailey* decisions regarding the intervening circumstance of resisting arrest. Because there is simply no way to predict who might resist arrest and thus its occurrence is merely happenstance, officers will not similarly be encouraged to pursue unreasonable searches and seizures as a result.

Under the final *Brown* factor, the actions of the Deputy in this instance undoubtedly constituted "flagrant misconduct as to require prophylactic exclusion." *Rawlings* v. *Kentucky*, 448 U.S. 98, 110 (1980). Despite Respondent's repeated attempts to characterize the traffic stop at issue as "routine," see, *e.g.*, Resp. Br. 5, 7, 18, the record makes clear that the

Deputy pulled over the vehicle in which Petitioner was a passenger without any reasonable suspicion that any of its occupants had violated the law and in the face of information indicating that his purported reason for making the stop was incorrect. It is well understood that police may stop a vehicle on a public street or highway when officers have *probable cause* to believe that someone in the vehicle has committed a public offense, even if that offense is simply a minor traffic offense, *Whren* v. *United States*, 517 U.S. 806, 817-19 (1996). But,

> except in [such] situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Prouse, 440 U.S. at 663.

Beyond the basic unreasonableness of the stop, this matter in fact presents a paradigmatic case of flagrancy because the Deputy took action in the face of contrary information he received *before* the stop. The Deputy's *post hoc* explanation – his need to check whether the valid temporary operating permit in fact belonged to that car – should have been dispelled when the dispatcher informed him that there was a pending permit application – necessitating a temporary permit – for that very car. At a minimum, this was not a case where the unreasonableness of the stop became apparent only after the fact, as with a misread license plate or confusion about whether car was in proper operating condition. Once the Deputy learned of the pending permit application and spotted the temporary operating permit, he no longer had any reasonable suspicion of wrongdoing insofar as the driver's right to operate the vehicle was concerned. Thus, the Deputy's actions appear to be analogous to those cases where

this Court has deemed police conduct flagrant because the purpose of the seizure was "'in the hope that something might turn up.'" *Barry* v. *New Jersey*, 454 U.S. 1017, 1021 (1981) (quoting *Brown*, 422 U.S. at 605)).

In sum, where as here, there was no "articulable and reasonable suspicion" of any wrongdoing on the part of the vehicle's occupants, the stop was anything but "routine." There can be no doubt that this stop was an unreasonable action taken in the face of contrary information already received by the Deputy. The supposed "routine" execution of such a stop therefore fails to purge the primary taint.

CONCLUSION

The decision of the California Supreme Court should be reversed, the sentence vacated, and the case remanded to the California Supreme Court with a direction to exclude the evidence uncovered as a result of the traffic stop.

Respectfully submitted,

JEFFREY T. GREEN
RICHARD A. KAPLAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ELIZABETH CAMPBELL*
2407 J Street
Suite 301
Sacramento, CA 95816
(916) 441-3792

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioner

* Counsel of Record

April 16, 2007

49 ~~757~~ 756

(1)

06-8120

FILED

MAR 5 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONER

MICHAEL T. RISHER
ACLU of Northern California
39 Drum Street
San Francisco, California 94111
(415) 621-2493

SUSAN N. HERMAN
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7945

STEVEN R. SHAPIRO
Counsel of Record
EMILY CHIANG
REGINALD T. SHUFORD
ALEXIS AGATHOCLEOUS
DENNIS D. PARKER
American Civil Liberties
Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

(Additional counsel continued on inside cover)

DENNIS COURTLAND HAYES
VICTOR L. GOODE
National Association for the
Advancement of Colored People
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(410) 580-5790

KENNETH KIMERLING
Asian American Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013
(212) 966-5932

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The PSLRA's Plain Language Requiring "A Strong Inference" Of Scienter Was Intended To Adopt The Second Circuit's Pleading Standard 6

II. Legislative History Confirms That Congress Intended To Adopt The Second Circuit's Strong Inference Standard 9

III. The PSLRA Has Successfully Achieved Its Goals Of Deterring Frivolous Litigation While Allowing Meritorious Cases To Proceed ... 11

IV. Petitioners And Their Amici Inappropriately Seek To Re-Write The PSLRA 13

V. The "Strong Inference" Requirement Should Be Read In The Context Of The PSLRA's Integrated Provisions Designed Both To Discourage Frivolous Lawsuits And To Encourage Meritorious Lawsuits 16

VI. Permitting Plaintiffs Only "The Most Plausible Of Competing Inferences" Would Violate The Seventh Amendment 18

Contents

Page

A. Courts May Not Weigh Evidence And Assess Witness Credibility 19

B. A Pleading Standard May Not Authorize A Court To Exercise Powers It May Not Constitutionally Exercise On Summary Judgment Or At Trial 22

VII. The SEC Correctly Argued In Twelve Prior Cases That The PSLRA Adopted The Second Circuit's "A Strong Inference" Pleading Standard 26

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

CASES

Abrams v. Baker Hughes,
292 F.3d 424 (5th Cir. 2002) 8

Acito v. IMCERA Group, Inc.,
47 F.3d 47 (2d Cir. 1995) 6

In re Advanta Corp. Securities Litigation,
180 F.3d 525 (3d Cir. 1999) 7

In re Alpharma Inc. Securities Litigation,
372 F.3d 137 (3d Cir. 2004) 8

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 22, 23

Baltimore & Carolina Line, Inc. v. Redman,
295 U.S. 654 (1935) 24

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 11

Bourjaily v. United States,
483 U.S. 171 (1987) 15

Brady v. Southern Railway Co.,
320 U.S. 476 (1943) 23

Byrd v. Blue Ridge Rural Electric Cooperative,
356 U.S. 525 (1958) 21

Cited Authorities

Page

In re Cabletron Systems Inc.,
311 F.3d 11 (1st Cir. 2002) 8

Central Bank of Denver
v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 12

City of Monroe Employees Retirement System
v. Bridgestone Corp.,
399 F.3d 651 (6th Cir.), *cert. denied*,
126 S. Ct. 423 (2005) 8, 18

City of Monterey v. Del Monte Dunes
at Monterey, Ltd.,
526 U.S. 687 (1999) 21

City of Philadelphia v. Fleming Cos.,
264 F.3d 1245 (10th Cir. 2001) 8

Conley v. Gibson,
355 U.S. 41 (1957) 21

Connecticut National Bank v. Germain,
503 U.S. 249 (1992) 6

Curtis v. Loether,
415 U.S. 189 (1974) 18

Dasho v. Susquehanna Corp.,
461 F.2d 11 (7th Cir.), *cert. denied*,
408 U.S. 925 (1972) 18

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 25

Cited Authorities

Page

Dimick v. Schiedt,
293 U.S. 474 (1935) 19, 20

Dolan v. United States Postal Service,
546 U.S. 481, 126 S. Ct. 1252 (2006) 16

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 21

Elkins v. Richardson-Merrell, Inc.,
8 F.3d 1068 (6th Cir. 1993) 25

Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340 (1998) 19

Florida State Board of Administration v. Green Tree Financial Corp.,
270 F.3d 645 (8th Cir. 2001) 8

Galloway v. United States,
319 U.S. 372 (1943) 23, 24

Immigration & Naturalization Service v. Cardoza-Fonseca,
480 U.S. 421 (1987) 28

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Daniel,
439 U.S. 551 (1979) 28

John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank,
510 U.S. 86 (1993) 16

Cited Authorities

Page

In re K-Tel International, Inc. Securities Litigation,
300 F.3d 881 (8th Cir. 2002) 17

Kelly v. United States,
789 F.2d 94 (1st Cir. 1986) 20

Lytle v. Household Manufacturing, Inc.,
494 U.S. 545 (1990) 23

Markman v. Westview Instruments, Inc.,
517 U.S. 370 (1996) 21

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 24, 25

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. ___, 126 S. Ct. 1503 (2006) 5, 16

Monsanto Co. v. Spray-Rite Service Corp.,
465 U.S. 752 (1984) 25

Myzel v. Fields,
386 F.2d 718 (8th Cir. 1967), *cert. denied*,
390 U.S. 951 (1968) 18

Neely v. Martin K. Eby Construction Co.,
386 U.S. 317 (1967) 24

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000) ..... *passim*

Cited Authorities

	Page
Pease v. Rathbun-Jones Engineering Co., 243 U.S. 273 (1917)	23
In re Peterson, 253 U.S. 300 (1920)	24
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	23
Reid v. Maryland Casualty Co., 63 F.2d 10 (5th Cir. 1933)	26
Rombach v. Chang, 355 F.3d 164 (2d Cir. 2004)	17
Scheuer v. Rhodes, 416 U.S. 232 (1974)	20
Thompson v. Mahre, 110 F.3d 716 (9th Cir. 1997)	23
United States v. Delaware & Hudson Co., 213 U.S. 366 (1909)	19
United States v. Johnson, 14 F.3d 766 (2d Cir. 1994)	7
Walker v. New Mexico & S.P.R. Co., 165 U.S. 593 (1897)	21

Page

Watt v. Alaska,
451 U.S. 259 (1981) 28

Wilkerson v. McCarthy,
336 U.S. 53 (1949) 23

CONSTITUTION, STATUTES, AND RULES

U.S. CONST. amend VII ..... *passim*

15 U.S.C. § 78o(c)(8) 16

15 U.S.C. § 78u-4(a)(3)(B)(vi) 3

15 U.S.C. § 78u-4(a)(4) 16

15 U.S.C. § 78u-4(b)(1) 17

15 U.S.C. § 78u-4(b)(2) 6

15 U.S.C. § 78u-4(b)(3)(B) 17

15 U.S.C. § 78u-4(b)(4) 18

15 U.S.C. § 78u-4(c) 17

15 U.S.C. § 78u-4(d) 25

15 U.S.C. § 78u-4(e) 18

15 U.S.C. § 78u-4(f)(2) 17

15 U.S.C. § 78u-5 18

Page

Fed. R. Civ. P. 9(b) 20

Fed. R. Civ. P. 11(b) 17

Fed. R. Civ. P. 50(a) 23

Advisory Committee Notes to 1991
Amendment to Fed. R. Civ. P. 50(a) 23

LEGISLATIVE HISTORY

H.R. Conf. Rep. 104-369,
1995 U.S.C.C.A.N. 730 3

H.R. Conf. Rep. 105-803,
available at 1998 WL 703964 10

S. Rep. 104-98, 1995 U.S.C.C.A.N. 679 ..... 3, 7

141 Cong. Rec. (1995) 10, 11

SECURITIES AND EXCHANGE COMMISSION AMICUS BRIEFS

Bryant v. Avado Brands, Inc.,
No. 98-9253, 1999 WL 33631523
(11th Cir. Feb. 16, 1999) ..... *passim*

Caprin v. Simon Transportation Services,
No. 01-4049, 2001 WL 34664973
(10th Cir. July 2, 2001) 27

Cited Authorities

Page

In re Comshare, Inc. Securities Litigation,
No. 97-2098, 1997 WL 34039763
(6th Cir. Nov. 1997) 27

Greebel v. FTP Software, Inc.,
No. 98-2194, 1999 WL 33911562
(1st Cir. May 1999) 27

Helwig v. Vencor, Inc.,
No. 99-5153, 2000 WL 34432856
(6th Cir. Aug. 18, 2000) 27

In re K-Tel International, Inc. Securities Litigation,
No. 00-3210 MN, 2000 WL 35483737
(8th Cir. Nov. 15, 2000) 27

Lone Star Ladies Investment Club v. Schlotzsky's, Inc.,
No. 99-50958, 1999 WL 33620099
(5th Cir. Dec. 28, 1999) 27

Nathenson v. Zonagen Inc.,
No. 99-20449, 1999 WL 33613893
(5th Cir. Sept. 30, 1999) 27

Novak v. Kasaks,
No. 98-9641 (2d Cir. Mar. 16, 1999) 27

In re Siticon Graphics, Inc. Securities Litigation,
No. 97-16240, 1997 WL 33551249
(9th Cir. Nov. 1997) 27

Cited Authorities

Page

Weld v. Stage Stores, Inc.,
No. 00-20230, 2000 WL 34032458
(5th Cir. June 2000) 27

Zeid v. Kimberley,
No. 97-16070, 1997 WL 33555504
(9th Cir. Oct. 1997) 27

OTHER AUTHORITIES

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) 11

Gary W. Anderson & Keith Brainard, *Profitable Prudence: The Case for Public Employer Defined Benefit Pension Plans*, Pension Research Council Working Paper 2004-6, The Wharton School, University of Pennsylvania, *http://rider.wharton.upenn.edu/~prc/PRC/WP/WP2004-6.pdf* (2004) 2

Cornerstone Research, "Securities Class Action Case Filings: 2006: A Year In Review," *http://securities.stanford.edu/clearinghouse_research/2006_YIR/20070102-01.pdf* 4, 12

National Association of State Retirement Administrators, "Key Facts Regarding State and Local Government Defined Benefit Retirement Plans," *http://www.nasra.org/news/article.asp?newsid=112* 2

Cited Authorities

Page

NERA Economic Consulting, "Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar," Jan. 2, 2007, *http://www.nera.com/publication.asp?p_ID=3028* . . 4, 12, 13

Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438 (1994) 11

Suja A. Thomas, *The PSLRA's Seventh Amendment Problem*, *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968893#PaperDownload* (Mar. 7, 2007) 19

Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995) 4, 11

RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993) 9

"Securities Lawsuits – Classier Actions," *The Economist*, Feb. 15, 2007 5

United States v. Ebbers, No. S4 02 Cr. 1144 (BSJ), Charge to the Jury (S.D.N.Y.), *available as* 1492 PLI/Corp 477 15

INTEREST OF *AMICI CURIAE*[1]

This brief is filed by public pension systems that invest billions of dollars in U.S. capital markets to fund obligations to their beneficiaries and, therefore, have a strong interest in the proper interpretation of the Private Securities Litigation Reform Act of 1995 ("PSLRA" or "Reform Act").

The New York State Common Retirement Fund ("NYSCRF") is the third largest public pension fund in the U.S., with over 980,000 members and beneficiaries and assets of approximately $140 billion. The California State Teachers' Retirement System is the largest teachers' retirement system in the U.S., with over 775,000 members and assets of more than $142 billion. The State of Wisconsin Investment Board invests over $75 billion in assets of the Wisconsin Retirement System (which has over 530,000 participants), the Wisconsin State Investment Fund, and other Wisconsin state trust funds. The Los Angeles County Employees Retirement Association is the largest county retirement system in the U.S., with 147,000 members and $35 billion in assets. The Teachers' Retirement System of Louisiana is the largest public retirement system in Louisiana, with 100,000 members and more than $11.9 billion in assets. The Arkansas Teacher Retirement System invests $11 billion in assets for the benefit of 112,000 members and beneficiaries. The Sacramento County Employees' Retirement System is a $6.2 billion pension plan for employees of Sacramento County, California. The Government of Guam Retirement Fund is a $3.94 billion pension plan for employees of the Government of Guam. The Louisiana Sheriffs Pension & Relief Fund is a $1.4 billion defined benefit pension plan for Louisiana sheriffs and deputies. The Jacksonville Police and Fire Pension Fund is an $886 million defined benefit pension

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of this brief and copies of their consent have been lodged with the Clerk of the Court.

plan for the police officers and firefighters of Jacksonville, Florida. The Anchorage Police and Fire Retirement System is a $400 million defined benefit pension plan for the police officers and firefighters of Anchorage, Alaska. In the aggregate, U.S. public pension plans cover more than 14 million workers and 6 million retirees and other beneficiaries and have assets of more than $2 trillion.[2]

The *amici*'s overriding responsibility is to invest for the long-term security of their active and retired members. As major investors with long-term outlooks, the *amici* are vitally concerned with the proper and efficient functioning of U.S. capital markets, and are particularly concerned that investors not be harmed by fraudulent conduct of issuers of publicly traded securities and others. Many state and local governments are constitutionally obligated to guarantee defined benefit retirement plans. Therefore, investment losses due to securities fraud fall directly on state and local governments and ultimately on taxpayers. If public pension funds are prevented from recovering money lost to securities fraud, the public will suffer.[3]

In recent years, public pension funds have become increasingly concerned about the integrity of the U.S. securities markets. Scandals at Enron, WorldCom, Global Crossing, Tyco, Xerox, Delphi, McKesson-HBO, and numerous others have caused hundreds of billions in losses to innocent investors. As investors who have been materially harmed by corporate fraud, *amici* have a strong interest that the law allow injured investors to recover from perpetrators of fraud.

---

[2] *See* Gary W. Anderson & Keith Brainard, *Profitable Prudence: The Case for Public Employer Defined Benefit Pension Plans*, Pension Research Council Working Paper 2004-6, The Wharton School, University of Pennsylvania, *http://rider.wharton.upenn.edu/~prc/PRC/WP/WP2004-6.pdf* (2004).

[3] In 2005, investment earnings accounted for 74 percent of all public pension plan revenue and employer (*i.e.*, taxpayer) contributions for only 17 percent. *See* National Association of State Retirement Administrators, "Key Facts Regarding State and Local Government Defined Benefit Retirement Plans," *http://www.nasra.org/news/article.asp?newsid=112* (Jan. 2007).

The *amici* believe that investors' ability to redress corporate wrongdoing through private actions under the Securities Exchange Act of 1934 is essential to deter improper conduct and to recoup damages. Indeed, with the PSLRA, Congress sought "to increase the likelihood that institutional investors will serve as lead plaintiffs," based on its belief "that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 732. Following the passage of the Reform Act, the *amici* have served as lead plaintiffs in numerous cases resulting in substantial recoveries, including *In re WorldCom, Inc. Securities Litigation* (S.D.N.Y.), in which lead plaintiff NYSCRF secured a settlement of more than $6 billion from investment banks, auditors, officers and directors, and *In re Cendant Corp. Securities Litigation* (D.N.J.), in which co-lead plaintiff NYSCRF secured a $3.2 billion settlement.[4]

Before 1995, settlements for more than $20 million were unusual, and settlements of $100 million or more were exceedingly rare. Since 1995, seven cases have settled for $1 billion or more, and more than 20 cases have settled for more than $100 million. Recoveries have reached unprecedented levels because of the cases' merit and institutional investor leadership.[5] At the same time, a much larger percentage of suits

---

[4] The *amici*, as long-term investors, also have an interest in preventing meritless, lawyer-driven litigation. As one of many ways the PSLRA discourages meritless cases, the statute's "professional plaintiff" provision bars a plaintiff from serving as lead plaintiff in more than five actions filed within three years, except as permitted by the court. *See* 15 U.S.C. § 78u-4(a)(3)(B)(vi). Notably, Congress gave courts discretion to allow "[i]nstitutional investors seeking to serve as lead plaintiff . . . to exceed this limitation [because they] do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 734.

[5] In the article that inspired the lead plaintiff provisions of the PSLRA, *see* S. Rep. 104-98, 1995 U.S.C.C.A.N. 679, 690 n.32,

(Cont'd)

filed since enactment of the PSLRA has been dismissed under the PSLRA's pleading standards.[6] Reflecting the PSLRA's deterrence of meritless cases, securities class action filings "plunged to a record low in 2006."[7] That decline has been most pronounced in the Seventh Circuit, where the number of securities class actions filed declined from an average of ten per year in 1996-2005, to two in 2006.[8] This drop demonstrates that the decision below has not encouraged frivolous shareholder suits.

SUMMARY OF ARGUMENT

The PSLRA's requirement that securities complaints allege facts giving rise to "a strong inference" that defendants acted with the required mental state should be construed in accordance with the plain language of the statute. Second Circuit cases decided after the PSLRA correctly construe the statute in light of its text and legislative history, and the approach of most other Circuits is consistent with that of the Second Circuit. Despite this, Petitioners and their *amici* ask this Court to rewrite the

---

(Cont'd)

Professors Weiss and Beckerman predicted that "[t]he largest benefit of institutional supervision of class actions is likely to be settlement terms that are more favorable to the plaintiff class, on average, than those now negotiated by essentially unsupervised plaintiffs' attorneys." Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2121 (1995). Their prediction has been fulfilled, exactly as Congress intended.

[6] *See* NERA Economic Consulting, "Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar," Jan. 2, 2007, *http://www.nera.com/publication.asp?p_ID=3028*.

[7] Cornerstone Research, "Securities Class Action Case Filings: 2006: A Year In Review," at 1, *http://securities.stanford.edu/clearinghouse_research/2006_YIR/20070102-01.pdf* (2007).

[8] "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 15. The Seventh Circuit's decision was handed down on January 25, 2006. *See* Appendix at 1a.

statute, proposing standards that contradict both the PSLRA's plain language and Congress's intent. Petitioners' and their *amici's* interpretations of the PSLRA also raise unnecessary constitutional questions, because they would require courts, in deciding motions to dismiss, to weigh competing evidence, assess the credibility of witnesses who are referred to in pleadings, and make ultimate findings of fact, thereby invading the province of the jury under the Seventh Amendment. This Court should avoid these constitutional issues by declining these invitations to rewrite the statute.

As Congress, courts, and the Securities and Exchange Commission ("SEC") have long recognized, private securities litigation is an invaluable part of the overall enforcement regime that compensates defrauded investors, deters fraud, protects investor confidence, and promotes fair and efficient capital markets. "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. __, 126 S. Ct. 1503, 1509 (2006).

Contrary to Petitioners' claims, further reform of securities litigation is not necessary. Fewer securities class actions are filed now than in the past, and more of the actions are terminated on motions to dismiss. Institutional investors are appointed as lead plaintiffs in more than half of the cases, and achieve settlements one-third larger than individual plaintiffs. *See* "Securities Lawsuits – Classier Actions," *The Economist*, Feb. 15, 2007, at 76. Institutional plaintiffs also carefully choose and closely monitor counsel, press for substantial settlements, and negotiate lower attorneys' fees. *See id.* The PSLRA is working the way that Congress intended and no reason exists to raise the scienter pleading bar higher than required by the statute. Rewriting the PSLRA as Petitioners propose would weaken the securities laws' deterrent effect and violate Congress's intent to maintain honest, fair, and efficient capital markets.

Amici urge the Court to uphold the scienter pleading standard adopted by the Second Circuit and most other Circuits under the PSLRA. This standard, based on the statute's plain language, protects innocent companies and their investors by strongly discouraging frivolous litigation, as shown by the increasing dismissal rates and decreasing number of cases filed since 1995. Raising the pleading standard further – as proposed by Petitioners and their *amici* – would prevent meritorious cases from proceeding, deny recovery to investors injured by fraud, and weaken the deterrence of corporate malfeasance.

ARGUMENT

I. The PSLRA's Plain Language Requiring "A Strong Inference" Of Scienter Was Intended To Adopt The Second Circuit's Pleading Standard

The PSLRA requires a plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. 78u-4(b)(2). To determine the meaning of this language, this Court should use the well-established principle of looking first to the statute's text and turning to legislative history only if the text is ambiguous. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). The Second Circuit followed exactly this approach in *Novak v. Kasaks*, 216 F.3d 300, 310 (2d Cir. 2000) (emphasis added):

> *[O]ur interpretive task begins and ends with the text of the statute.* In drafting paragraph (b)(2), Congress specifically incorporated this circuit's "strong inference" language to define the pleading standard for securities fraud cases. *Compare* 15 U.S.C. 78u-4(b)(2) (requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"), *with Acito [v. IMCERA Group, Inc.]*, 47 F.3d [47,] 52 [(2d Cir. 1995)] ("[P]laintiffs must allege facts that give rise to a strong inference of fraudulent

> intent."). We agree with the Third Circuit that this "use of the Second Circuit's language *compels* the conclusion that the Reform Act establishes a pleading standard approximately equal in stringency to that of the Second Circuit." *In re Advanta Corp. [Sec. Litig.]*, 180 F.3d [525,] 534 [(3d Cir. 1999)]. *Cf. United States v. Johnson*, 14 F.3d 766, 770 (2d Cir. 1994) (finding that Congress's use of "substantially identical language" to that of an earlier statute "bespeaks an intention to import" judicial interpretations of that language into the new statute).

The Second Circuit's "strong inference" standard was "[r]egarded as the most stringent pleading standard" before the PSLRA was enacted. S. Rep. No. 104-98, 1995 U.S.C.C.A.N. 679, 694. Congress raised the bar nationally by adopting the Second Circuit's exact language.

Because the PSLRA unambiguously adopted the Second Circuit's "strong inference" standard, "no resort to the legislative history or the purposes of the PSLRA is required." *Novak*, 216 F.3d at 310. Rather, the meaning of a "strong inference" of scienter was already defined by well-developed case law that provides guidance as to what a securities fraud complaint must contain to satisfy this standard. In its most comprehensive decision addressing the pleading standards under the PSLRA, the Second Circuit held that the requisite "strong inference" may arise from *particularized facts* that defendants "(1) benefited in a concrete and personal way from the purported fraud . . . (2) engaged in deliberately illegal behavior . . . (3) knew facts or had access to information suggesting that their public statements were not accurate . . . or (4) failed to check information they had a duty to monitor." *Novak*, 216 F.3d at 311. The Second Circuit emphasized that courts "need not and should not rely on magic words such as motive and opportunity." *Id.* Thus, Petitioners mischaracterize the Second Circuit's

appropriately flexible reading of the statute, which considers all relevant facts in each case. *See* Petitioners' Br. at 36 n.16.[9]

Moreover, the claimed differences between the circuits' interpretations of the strong inference standard are overstated. While some courts cite purported distinctions in the application of the standard – for example, either generally disavowing or embracing motive and opportunity in the abstract as sufficient to plead a strong inference of scienter – in practice, virtually all courts require a showing of scienter based on a review of the *totality* of the facts. "Taken as a whole, the cases simply do not substantiate the fear that courts applying the motive and opportunity formulation will permit pleadings to go forward without facts strongly suggesting wrongdoing." *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 659 (8th Cir. 2001).

In fact, circuits that Petitioners claim are "split" consistently hold that a claim should be dismissed unless the totality of the facts alleged supports a strong inference of scienter. *See, e.g., In re Cabletron Sys. Inc.*, 311 F.3d 11, 27, 33 (1st Cir. 2002); *Novak v. Kasaks*, 216 F.3d at 311; *In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 148-49 (3d Cir. 2004); *Abrams v. Baker Hughes*, 292 F.3d 424, 430 (5th Cir. 2002); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 683 (6th Cir.), *cert. denied*, 126 S. Ct. 423 (2005); *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1261-62 (10th Cir. 2001). Thus, Petitioners' claim that confusion among the circuits requires this Court to adopt a wholly new pleading standard is ill-founded.

---

[9] *Amici* concur with the United States that "[t]his case presents no question concerning the proper role of motive-and-opportunity allegations under the PSLRA, because respondents have not alleged that petitioner Notebaert had a motive and opportunity to defraud..." U.S. Br. at 18, n.5. Thus, the Court should decline the invitation by certain *amici* supporting Petitioners to eliminate motive and opportunity allegations as a way to plead scienter because the question is not properly before the Court.

Contrary to Petitioners' arguments, the PSLRA's use of "a strong inference" also demonstrates that Congress did not intend to require that the alleged facts support the strongest possible inference, the most plausible inference, or an inference that excludes all possible competing inferences. The statutory text requires particularized allegations giving rise to a "strong" inference of scienter. The dictionary definitions of "strong" that best fit this provision are "solid" or "persuasive." RANDOM HOUSE UNABRIDGED DICTIONARY 1886 (2d ed. 1993). If Congress meant to require a compelling or exclusive inference or the strongest or most plausible inference, it would have said so.

II. Legislative History Confirms That Congress Intended To Adopt The Second Circuit's Strong Inference Standard

Because the statute's text is unambiguously based on the Second Circuit's "strong inference" test, no examination of legislative history is necessary. *See Novak*, 216 F.3d at 310. However, if the Court wishes to consider legislative history, the SEC's previous examination of that history is compelling. The SEC's examination of the legislative history, which is contained in the SEC's *amicus* brief in *Bryant v. Avado Brands, Inc.*, No. 98-9253, 1999 WL 33631523 (11th Cir. Feb. 16, 1999) (referred to herein as "SEC's *Novak* Br."),[10] led the SEC to conclude that:

> The correctness of the district court's holding that the Reform Act adopts the Second Circuit standard [not only] is established by the Act's language. It is confirmed by authoritative statements by Congress in the legislative history of the Act and by Congress and the President in the legislative history of the related, recently enacted Securities Litigation Uniform Standards Act of 1998 . . . [T]he Commission submits this brief to urge the Court to

[10] The SEC's *amicus* brief filed with the Second Circuit in *Novak v. Kasaks* included its *amicus* brief from *Bryant v. Avado Brands, Inc.* as an attachment.

> adopt this dominant and correct interpretation of the Reform Act.

1999 WL 33631523, at *5. In *Novak*, the SEC argued that the PSLRA's legislative history inexorably leads to the conclusion that Congress enacted the Second Circuit's pleading standard. *See id.* at *12-13 (citing floor comments by Conference Committee Managers). The SEC further explained that the legislative history following President Clinton's veto of the PSLRA reconfirmed Congress's intent to adopt the Second Circuit standard. *See id.* at *13-14 (Senator Domenici said that the pleading standard "is the Second Circuit's pleading standard"); *see also* 141 Cong. Rec. S19,067-068 (1995).

In 1998, Congress reaffirmed that it had adopted the Second Circuit's pleading standard when it passed the Securities Litigation Uniform Standards Act ("SLUSA"):

> The [PSLRA] established a heightened uniform Federal standard on pleading requirements *based upon the pleading standard applied by the Second Circuit Court of Appeals*. Indeed, the express language of the Reform Act itself carefully provides that plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."

H.R. Conf. Rep. 105-803, *available at* 1998 WL 703964, at *15 (emphasis added). Thus, legislative history demonstrates that when Congress enacted the "strong inference" requirement, it intended to adopt the Second Circuit standard.[11]

---

[11] The SEC's *Novak* Brief convincingly refutes the contention by Petitioners and certain *amici* that a single footnote in the PSLRA Conference Committee Report, which states that the Reform Act "does not intend to codify the Second Circuit's case law," means that the Act was intended to raise the standard *above* the Second Circuit. As the SEC explained, "[t]he Conference Committee did not intend to codify each and every word of the Second Circuit's case law because of the

(Cont'd)

III. The PSLRA Has Successfully Achieved Its Goals Of Deterring Frivolous Litigation While Allowing Meritorious Cases To Proceed

The PSLRA has already achieved Congress's intent under the prevailing interpretation of the statute. Since 1995, the dynamics of securities class actions, especially cases involving large investor losses, have changed radically. Institutional investors have come to the fore in most such cases. They have sought appointment as lead plaintiffs, pressed counsel to prosecute class members' claims vigorously, and negotiated lower attorney fees, as a percentage of recoveries, than was typical before the PSLRA.

Despite this, Petitioners and several of their *amici* claim that securities fraud litigation is still rife with abuse. Yet the sources on which Petitioners and their *amici* rely predate the PSLRA.[12] As a consequence of the elimination of aiding and

(Cont'd)

view that *some cases did not apply the Second Circuit pleading standard in a sufficiently stringent manner . . . . [T]his does not mean that Congress did not adopt the Second Circuit standard.*" 1999 WL 33631523, at *18-19 (emphasis added); *see also* 141 Cong. Rec. S17,960 (1995) (Senator Dodd said that "we are trying to hold to that [standard that] came out of the second circuit, not on a case-by-case basis where they differed in some degree in interpretation").

[12] For example, Petitioners and virtually all their *amici* quote, as if it described the current litigation environment, this Court's discussion *in 1975* of problems then posed by potentially abusive securities fraud claims. *See, e.g.*, Petitioners' Br. at 28 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)). Petitioners and several *amici* also cite Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991). But that study looked at class actions filed during the mid-1980s that advanced claims based primarily on Section 11 of the Securities Act of 1933, which does not require scienter. It is irrelevant to cases under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, and has been thoroughly discredited by other scholars. *See, e.g.*, Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 453 (1994); Weiss & Beckerman, 104 YALE L.J. at 2080-84.

abetting liability in private securities litigation in 1994[13] and the enactment of the PSLRA in 1995 and SLUSA in 1998, securities litigation today is vastly different. Potentially frivolous cases no longer pose the problems described a decade ago, while meritorious cases have gained prominence in response to recent outbreaks of corporate wrongdoing. Based upon the most recent evidence, under the PSLRA, recoveries have exponentially increased, the number of lawsuits filed has substantially declined, and the dismissal rate has jumped.[14]

The most recent study by NERA Economic Consulting, whose work was cited by Congress when debating the PSLRA, found that in 2006, class action filings dropped 36% from 2005, and 44% from the overall post-PSLRA average. *See* NERA, "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 2. A similar study by Cornerstone Research found a 49% decline from 2005, and a 66% decline from the historic average. *See* "Securities Class Action Case Filings: 2006: A Year In Review," *supra* n.7, at 1.

Moreover, NERA reports that "the probability of a company facing a suit that survives a motion to dismiss has fallen by more than 30%." "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 3. The probability of a shareholder class action being brought in the first place has dropped nearly 10% to 1.6%. *See id.* Dismissal rates have doubled since the passage of the PSLRA. *See id.* at 4. On the other hand, with regard to settlement value, NERA reports:

> This year will stand out as one of record settlements. There were more settlements over $100 million – the so-called mega-settlements – in 2006 than in 2005, itself a record-breaking year.

---

[13] *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

[14] Data reflecting dismissal rates undercut any claim that differences in substantive standards have caused forum shopping. *See* "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 4.

Id. at 1. Thus, contrary to Petitioners' argument that "securities fraud suits are particularly subject to meritless strike suits," Pet. Br. at 27 (citing law review articles from 1991), fewer cases are being filed, and those that proceed to discovery are much stronger, resulting in larger recoveries for plaintiffs. The current regime is working and no policy reason exists to rewrite the PSLRA.

IV. Petitioners And Their Amici Inappropriately Seek To Re-Write The PSLRA

The Second Circuit's standard for pleading "a strong inference" of scienter has provided meaningful guidance, and courts have applied that standard in a consistent fashion. In contrast, the varied and confusing formulations proposed by Petitioners and their *amici*, which would require this Court to graft words onto the PSLRA, would defeat Congress's intent.

Petitioners propose rewriting the PSLRA to "impose[] a burden on the plaintiff to plead specific facts that, if proven to be true, cogently demonstrate a substantial claim as to scienter *that meaningfully tends to exclude innocent possibilities*." Pet. Br. at 16 (emphasis added). This formulation contains concepts that—unlike the Second Circuit's "strong inference" requirement—have no grounding in judicial decisions handed down before or after passage of the PSLRA. Neither the PSLRA's language nor case law provides any basis for requirements such as "cogently demonstrate," "substantial claim," or "meaningfully tends to exclude innocent possibilities." By importing these concepts, Petitioners ask this Court to rewrite the PSLRA, inviting the constitutional issues discussed below.

Petitioners' *amici* similarly ask this Court to rewrite the PSLRA, proposing that:

> [A] court will necessarily have to consider whether the facts alleged in the complaint leave open a range of non-culpable explanations for the defendant's conduct . . . [W]here there is a substantial possibility

> that the defendant acted without scienter, the inference of scienter will not be strong.

U.S. Br. at 8-9. Again, these concepts – "non-culpable explanations" and "substantial possibility" – are found nowhere in the PSLRA. The standards proposed by other Petitioners' *amici* are similarly confusing, sharing only that: (1) with no justification, they seek to apply *more stringent* pleading standards than the Second Circuit formulation that Congress adopted; and (2) they find no support in either the PSLRA's language, case law existing when the PSLRA was passed, or legislative history.[15]

Proving a defendant's state of mind turns on facts that vary with the circumstances. The Second Circuit recognizes this: "[G]eneral standards offer little insight into precisely what actions and behaviors constitute recklessness sufficient for § 10(b) liability. It is the actual facts of our securities fraud cases that provide the most concrete guidance as to the types of allegations required" to plead scienter. *Novak v. Kasaks*, 216 F.3d at 308. Even in criminal cases, where the government must prove beyond a reasonable doubt that the defendant had the

---

[15] The Securities Industry and Financial Markets Association and the Chamber of Commerce of the USA propose that "plaintiffs alleging claims for securities fraud must plead facts that strongly tend to exclude innocent explanations for the challenged conduct." SIFMA/Chamber of Commerce Br. at 2; *see also id.* at 25 n.5 ("the recklessness standard is 'too amorphous' and 'belies the existence of a bright-line test'"). The American Institute of Certified Public Accountants and six accounting firms propose that "plaintiff must plead particularized facts that, if proven, lead convincingly to the conclusion that the defendant acted with scienter." AICPA Br. at 2-3. The Washington Legal Foundation proposes that "[u]nder the PSLRA, if the adverse inferences drawn from the particularly pled facts in the complaint do not tend to exclude the defendant's having acted with a non-culpable mental state, then Congress's 'strong inference' standard in the PSLRA should not be met as a matter of law." WLF Br. at 23. The Court should decline all of these invitations to rewrite the statute.

requisite criminal intent, it need not disprove every alternative theory regarding defendant's state of mind. *See, e.g., United States v. Ebbers*, No. S4 02 Cr. 1144 (BSJ), Charge to the Jury (S.D.N.Y.), *available as* 1492 PLI/Corp 477, at *518-20 ("It is not necessary for the Government to show that the defendant was fully informed as to all the details of the conspiracy" or that the defendant "receive[d] any monetary benefit.").

Petitioners nonetheless argue that plaintiffs' allegations must "*meaningfully tend[] to exclude innocent possibilities*." Pet. Br. at 16 (emphasis added). By requiring plaintiffs to negate all innocent inferences, Petitioners seek to dramatically heighten the pleading standard. The PSLRA requires that the complaint support "a strong inference" of scienter, not eliminate every possible negative inference. Possible negative inferences can be overcome, even at trial, by a review of the "total mix" of information, as is true in criminal law. *Bourjaily v. United States*, 483 U.S. 171, 180 (1987) ("[T]he sum of an evidentiary presentation may well be greater than its constituent parts . . . a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.").

Further, requiring complaints to eliminate every possible innocent inference would enable corporate insiders who commit securities fraud to insulate themselves from liability by taking steps designed to create the illusion of innocent conduct. By fabricating innocent explanations for their actions, perpetrators of fraud could create very weak, but facially plausible, innocent inferences that would lead to dismissal of meritorious cases before any discovery under Petitioners' reading of the PSLRA. Congress did not intend to immunize fraud in that way.

V. The "Strong Inference" Requirement Should Be Read In The Context Of The PSLRA's Integrated Provisions Designed Both To Discourage Frivolous Lawsuits And To Encourage Meritorious Lawsuits

Petitioners and their *amici* present the scienter pleading standard as their sole defense against meritless cases, but in fact it is only one of the PSLRA's many provisions designed to protect innocent defendants. The PSLRA is a carefully balanced statute that erected numerous hurdles to frivolous securities fraud claims, along with provisions designed to strengthen the prosecution of meritorious cases.[16]

To filter meritorious from frivolous cases, Congress enacted provisions relating not only to pleading scienter, but also requiring court appointment of lead plaintiffs and lead counsel, raising the pleading standard for false and misleading statements, imposing a discovery stay, sanctioning abusive litigation, limiting damages and attorneys' fees, and creating a safe harbor for forward-looking statements, among other provisions. *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. at 1511.[17]

---

[16] In interpreting the statute, the Court should be "guided not by 'a single sentence or member of a sentence, but [should] look[] to the provisions of the whole law, and to its object and policy.'" *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (internal citation omitted); *see also Dolan v. United States Postal Serv.*, 546 U.S. 481, 126 S. Ct. 1252, 1257 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

[17] The PSLRA further ensures against lawyer-driven litigation by limiting the lead plaintiffs' share of any final judgment or settlement to their pro rata share of the class's recovery, plus any reasonable costs and expenses approved by the court. *See* 15 U.S.C. § 78u-4(a)(4). The PSLRA also prohibits referral fees to any broker or dealer for assisting an attorney in obtaining clients for any securities class action. *See* 15 U.S.C. § 78o(c)(8). Thus, the PSLRA ended perceived abuses in the relationship between certain plaintiffs' lawyers and their clients.

Under these provisions, lead plaintiffs are appointed after court scrutiny of their economic interest and adequacy as class representatives. Their complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint [must] state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Courts rigorously enforce these standards. *See, e.g., Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004); *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 892-93 (8th Cir. 2002). The PSLRA also imposes a discovery stay, which eliminates the cost and burden of complying with discovery requests that could coerce defendants into settling meritless cases, and the possibility that plaintiffs could use discovery to support a complaint. 15 U.S.C. § 78u-4(b)(3)(B).

Further, the PSLRA requires the court to make "specific findings" upon final adjudication of every securities class action regarding compliance by each party and attorney with Federal Rule of Civil Procedure 11(b). 15 U.S.C. § 78u-4(c). Unlike other civil actions in which a court may consider Rule 11 sanctions only after the challenged party has notice and an opportunity to withdraw the challenged pleading, in securities class actions, the court-appointed lead plaintiff and counsel must litigate knowing that the court will scrutinize their conduct in every case under Rule 11. Together with the pleading standards and the stay of discovery, these requirements powerfully deter frivolous complaints.[18]

---

[18] Other barriers to meritless cases in the PSLRA include the provision that each defendant's liability for non-knowing misconduct is proportionate to its jury-determined share of responsibility, and liability is only joint and several in cases of knowing misconduct, *see* 15 U.S.C. § 78u-4(f)(2); that plaintiffs have the burden of proving that their losses were caused by defendants' misstatements or omissions, (Cont'd)

VI. Permitting Plaintiffs Only "The Most Plausible Of Competing Inferences" Would Violate The Seventh Amendment

The Court should reject Petitioners' proposed interpretation of the PSLRA scienter pleading standard because it would violate plaintiffs' right to a jury trial under the Seventh Amendment.[19] The Sixth and Seventh Circuits have correctly noted that permitting plaintiffs only "'the most plausible of competing inferences'" is problematic under the Seventh Amendment. *See* App. at 20a (quoting *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d at 683 n.25). Indeed, Petitioners' reading of the PSLRA would unconstitutionally transform the trial court into the ultimate finder of fact for scienter. The statutory language and Congressional intent require no such unconstitutional result. If the Court considers Petitioners' reading a possible alternative, however, the doctrine of avoiding unnecessary constitutional questions should weigh heavily against Petitioners' interpretation of the statute. Indeed, a recent scholarly study

---

(Cont'd)

see 15 U.S.C. § 78u-4(b)(4); that damages are limited based on the mean trading price of the securities during the 90 days after disclosure of the truth about the misrepresentations or omissions, *see* 15 U.S.C. § 78u-4(e); and that forward-looking statements cannot form the basis of liability if they comply with a safe harbor, *see* 15 U.S.C. § 78u-5.

[19] The right to jury trial in suits for damages under the federal securities laws is beyond question. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974) ("when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts . . . a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law"); *Dasho v. Susquehanna Corp.*, 461 F.2d 11, 20-23 (7th Cir.) (recognizing right to jury trial in federal securities law action for damages), *cert. denied*, 408 U.S. 925 (1972); *Myzel v. Fields*, 386 F.2d 718, 740-42 (8th Cir. 1967) (same), *cert. denied*, 390 U.S. 951 (1968).

confirms that Petitioners' position poses grave constitutional concerns in light of the common-law right to jury trial.[20]

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one – the one the Court would adopt in any event. . . . Rather, the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation – when that interpretation is *reasonable*, though not necessarily the best." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 356, 358-59 (1998) (Scalia, J., dissenting) (emphasis in original; internal citations omitted). The doctrine of avoiding constitutional doubt has special force regarding the Seventh Amendment. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

A. Courts May Not Weigh Evidence And Assess Witness Credibility

Petitioners' proposed pleading standard would violate the Seventh Amendment because it would require courts to weigh competing facts, including assessing witnesses' credibility, to determine, on motions to dismiss, whether complaints "plead specific facts that, if proven to be true, cogently demonstrate a substantial claim as to scienter that

---

[20] *See* Suja A. Thomas, *The PSLRA's Seventh Amendment Problem, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968893 #PaperDownload* (Mar. 7, 2007).

meaningfully tends to exclude innocent possibilities." Pet. Br. at 16. Petitioners emphasize that courts should "weigh . . . facts that support an inference of innocence" against facts that support an inference of scienter, and should "review[] the complaint with an eye on the plaintiff's ultimate prospects for success . . . ." *Id.* at 17, 23.

The Seventh Amendment, however, bars courts from weighing competing facts to make the ultimate determination of liability. "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick*, 293 U.S. at 486. Dismissal at the pleading stage is constitutionally permissible only when there are no "factual issues to be resolved," but only "questions of law for the court to decide." *Kelly v. United States*, 789 F.2d 94, 97-98 (1st Cir. 1986).

This Court has cautioned on the narrow scope of the judicial role on dismissal motions:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Such a "limited" scope of power to close the courthouse door to plaintiffs before they even gain access to discovery is essential to preserve the right to trial by jury.

Heightened pleading standards may be enacted through rulemaking or legislation, as evidenced by Federal Rule of Civil Procedure 9(b) and the PSLRA. However, pleading standards may not render the trial judge the ultimate finder of fact. This requirement is inherent in "the accepted rule that a complaint should not be dismissed for failure to state

a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A court deciding a motion to dismiss under the PSLRA may measure plaintiff's allegations against the statutory requirement of a strong inference of scienter, but the court may not constitutionally weigh conflicting evidence or assess the credibility of the witnesses quoted in the complaint. The Constitution reserves to the jury the power to weigh conflicting evidence and assess witnesses' credibility:

> In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624-25 (1991). The "substance of right" preserved by the Seventh Amendment "requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative." *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593, 596 (1897). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999) (if a question is "predominantly factual," then "in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury"); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996) ("the substance of the common-law right of trial by jury" can be measured by "the distinction between substance and procedure" and by "the line . . . between issues of fact and law") (internal citation and quotation marks omitted); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 539 (1958) ("the

[factfinding] function assigned to the jury is an essential factor in the process for which the Federal Constitution provides") (internal citation and quotation marks omitted).

B. A Pleading Standard May Not Authorize A Court To Exercise Powers It May Not Constitutionally Exercise On Summary Judgment Or At Trial

The constitutional impropriety of Petitioners' proposed standard for PSLRA motions to dismiss is highlighted by comparison with the established standards on summary judgment and on motions for judgment as a matter of law. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment comports with the Seventh Amendment because "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. This Court has taken care to limit the judge's role on summary judgment in order to preserve the factfinding power of the jury:

> [Summary judgment] by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

477 U.S. at 255. In fact, even though summary judgment motions are generally heard only after the completion of discovery, "there is no such thing as a finding of fact on summary judgment. What are sometimes loosely termed 'findings' are instead facts

as to which there is no genuine issue." *Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997).[21]

The well-established standard for judgment as a matter of law (which is substantially the same as the standard for summary judgment, *see Anderson*, 477 U.S. at 251-52) likewise supports rejection of Petitioners' interpretation of the PSLRA. The Court has upheld the practice of directing a verdict for insufficiency of evidence, because such a directed verdict was permitted under the common law. *See Galloway v. United States*, 319 U.S. 372, 390-91 (1943). As the Court has repeatedly held, such a directed verdict comports with the Seventh Amendment because on a motion for judgment as a matter of law (as a directed verdict is now styled under Fed. R. Civ. P. 50(a)), a court must "give credence" only to evidence favoring the nonmoving party, "must draw all reasonable inferences in favor of the nonmoving party, and . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990) ("in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party"); *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949) (same); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943) (same); Advisory Committee Notes to 1991 Amendment to Fed. R. Civ. P. 50(a) ("The expressed standard [that 'there is no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmoving] party'] makes

---

[21] The United States (U.S. Br. at 28) cites *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273 (1917), which held that summary judgment in an equity case to enforce a bond did not offend the Seventh Amendment. 243 U.S. at 278-79. *Pease*'s reasoning was superseded by the merger of law and equity upon the adoption of the Federal Rules of Civil Procedure in 1938. In any event, summary judgment does *not* empower judges to find facts.

clear that action taken under the rule . . . is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment").[22]

The Court's decisions regarding summary judgment in antitrust cases are consistent with these principles. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court held that "cutting prices in order to increase business often is the very essence of competition" and that "economic realities tend to make predatory pricing conspiracies self-deterring." *Id.* at 594, 595. Therefore, "petitioners had no motive to enter into the alleged

---

[22] *Galloway* affirmed a directed verdict, because this Court held that plaintiff's case rested on "sheer speculation," "with[held] crucial facts," suffered from "inherent vagueness," and "omitted or withheld" "essential elements." 319 U.S. at 396. The *Galloway* Court's statement that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even [in 1791] so widely among common-law jurisdictions," is therefore fully consistent with the principle that a court has no power to find the facts. 319 U.S. at 392. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), and *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), cited by the United States (U.S. Br. at 27-28), upheld the validity of directed verdicts under the Seventh Amendment, but provide no support for making the court the factfinder. "The aim of the amendment is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form and procedure, *and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury* under appropriate instructions by the court." *Baltimore & Carolina Line, Inc.*, 295 U.S. at 657 (emphasis added). Similarly, *In re Peterson*, 253 U.S. 300 (1920), cited by the United States (U.S. Br. at 27), permits the use of a court-appointed auditor to report on the facts because "the parties will remain as free to call, examine, and cross-examine witnesses [before the jury] as if the report had not been made" and "[n]o incident of the jury trial is modified or taken away" by the auditor's role. 253 U.S. at 311.

conspiracy," and summary judgment for defendants was appropriate "where the evidence of conspiracy is speculative or ambiguous." *Id.* at 595. *Matsushita* turned on economic analysis of objective market data, not assessment of witnesses' credibility and weighing of conflicting evidence. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1073 (6th Cir. 1993) (*Matsushita* "does not require weighing credibility"). This Court was careful to affirm in *Matsushita* that even in antitrust conspiracy cases, "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." 475 U.S. at 587 (alterations in original; internal citation omitted). *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), which affirmed a jury verdict finding a price-fixing conspiracy, defines the "standard of proof" required in a jury trial but provides no support for empowering the court to find facts on motions to dismiss in violation of the Seventh Amendment. *Id.* at 755.[23]

Congress recognized in the PSLRA that scienter in securities cases remains a question of fact whose ultimate determination is reserved to the jury; it expressly provided that at defendants' request, the court must "submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred." 15 U.S.C. § 78u-4(d). "District Judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given

[23] Similarly, the "gatekeeping role for the judge" regarding admission or exclusion of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), neither offends the Seventh Amendment nor supports the pleading standard proposed by Petitioners. "The direction to take a 'hard look' at the basis of a scientific opinion [under *Daubert*] does not require weighing credibility" and therefore comports with the right to jury trial. *Elkins*, 8 F.3d at 1073.

to their testimony. They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution." *Reid v. Maryland Cas. Co.*, 63 F.2d 10, 11 (5th Cir. 1933).

Construing the PSLRA to require judges to assess witnesses' credibility, weigh the conflicting facts alleged by plaintiffs and defendants, and determine whether a complaint establishes "the most plausible of competing inferences" that "tends to exclude" any innocent inference would obliterate the Seventh Amendment lines between fact and law and between substance and procedure that demarcate the provinces of jury and judge.

VII. The SEC Correctly Argued In Twelve Prior Cases That The PSLRA Adopted The Second Circuit's "A Strong Inference" Pleading Standard

According to the SEC, "[i]n using the term 'strong inference' *Congress adopted the Second Circuit standard.*" SEC's *Novak* Brief, 1999 WL 33631523, at *5 (emphasis added).

> [T]he Reform Act uses the "strong inference" language, which the Second Circuit developed as a pleading standard in a long line of securities cases. *It may be presumed, absent contrary evidence, that Congress intended to adopt the judicial definition of that pleading standard.*

Id. at *10 (emphasis added). In its *Novak* Brief, the SEC further stated:

> *This [Second Circuit] test is proven, sound, widely used, and consistent with the Reform Act's purposes.* Nothing in the language or history of the Act shows that the Act deviates from this established means of pleading a "strong inference."

Id. at *5 (emphasis added). Based on this view, the SEC urged the *Novak* court to "adopt this dominant and correct

interpretation of the Reform Act." *Id.* The *Novak* court agreed with the SEC (*see* 213 F.3d at 310-11), and its decision has been generally followed.

Despite this position in twelve prior cases,[24] the SEC now claims for the first time that Congress "*built upon* the Second Circuit's 'strong inference' terminology and added various other pleading requirements, resulting in a statute that was intended to *strengthen* existing pleading requirements." U.S. Br. at 18 (emphasis added). This altered position is erroneous and should be rejected. As the SEC previously recognized and repeatedly argued, there is no basis to contend that the plain meaning of the "strong inference" requirement of the PSLRA means anything other than the Second Circuit's standard, whose exact language Congress enacted into law. *See also Novak*, 216 F.3d at 310 ("we conclude that the PSLRA effectively raised the nationwide pleading standard to that previously existing in this circuit

---

[24] The following SEC amicus briefs argue that the PSLRA adopted the Second Circuit pleading standard: (1) *Caprin v. Simon Transportation Services*, No. 01-4049, 2001 WL 34664973 (10th Cir. July 2, 2001); (2) *In re K-Tel Int'l, Inc. Sec. Litig.*, No. 00-3210 MN, 2000 WL 35483737 (8th Cir. Nov. 15, 2000); (3) *Helwig v. Vencor, Inc.*, No. 99-5153, 2000 WL 34432856 (6th Cir. Aug. 18, 2000); (4) *Weld v. Stage Stores, Inc.*, No. 00-20230, 2000 WL 34032458 (5th Cir. June 2000); (5) *Lone Star Ladies Investment Club v. Schlotzsky's, Inc.*, No. 99-50958, 1999 WL 33620099 (5th Cir. Dec. 28, 1999); (6) *Nathenson v. Zonagen Inc.*, No. 99-20449, 1999 WL 33613893 (5th Cir. Sept. 30, 1999); (7) *Greebel v. FTP Software, Inc.*, No. 98-2194, 1999 WL 33911562 (1st Cir. May 1999); (8) *Novak v. Kasaks*, No. 98-9641 (2d Cir. Mar. 16, 1999) (in this case, the SEC filed a short statement to which its complete brief in *Bryant v. Avado Brands, Inc.* ((9) below) was attached); (9) *Bryant v. Avado Brands, Inc.*, No. 98-9253, 1999 WL 33631523 (11th Cir. Feb. 16, 1999); (10) *In re Comshare, Inc. Sec. Litig.*, No. 97-2098, 1997 WL 34039763 (6th Cir. Nov. 1997); (11) *In re Silicon Graphics, Inc. Sec. Litig.*, No. 97-16240, 1997 WL 33551249 (9th Cir. Nov. 1997); and (12) *Zeid v. Kimberley*, No. 97-16070, 1997 WL 33555504 (9th Cir. Oct. 1997).

and no higher (with the exception of the 'with particularity' requirement)"). [25]

This Court has held that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Moreover, an agency's interpretation of legislation that was contemporaneous with the legislation is entitled to considerably more deference than the agency's later, inconsistent interpretation. *See Watt v. Alaska*, 451 U.S. at 272-73. "[T]he SEC's present position is flatly contradicted by its past actions" and deserves no deference. *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 566 (1979). The SEC's prior, consistent position in twelve separate amicus briefs filed in circuit courts across the country during the first six years after enactment of the PSLRA is more persuasive and deserves greater weight than its current, inconsistent view, announced for the first time in its brief in this case.

---

[25] In its *Novak* Brief, the SEC also stressed the importance of the Reform Act's intent to import the Second Circuit's standard that allowed "recklessness" to be the basis for alleging a "strong inference" of scienter, stating:

> The Commission . . . believes that elimination of the recklessness liability would encourage corporate directors and officers to put their heads in the sand and would have enormously counterproductive effects on the integrity of corporate disclosure and the quality of corporate governance.

1999 WL 33631523, at *10.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JAY W. EISENHOFER
GEOFFREY C. JARVIS
LESLEY E. WEAVER
SHARAN NIRMUL
GRANT & EISENHOFER P.A.
1201 North Market Street
Suite 2100
Wilmington, DE 19801
(302) 622-7000

MAX W. BERGER
Counsel of Record
SALVATORE J. GRAZIANO
JOHN C. BROWNE
ELLIOTT J. WEISS
JAI K. CHANDRASEKHAR
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

ALAN P. LEBOWITZ
General Counsel to
THOMAS P. DINAPOLI
Comptroller of the State of New York and, as Such, Trustee of the New York State Common Retirement Fund
110 State Street
Albany, NY 12244
(866) 805-0990

L. JANE HAMBLEN
Chief Legal Counsel
THE STATE OF WISCONSIN
INVESTMENT BOARD
121 East Wilton Street
P.O. Box 7842
Madison, WI 53707
(608) 266-2381

ROBERT VAN DER VOLGEN
Assistant Chief Counsel
CALIFORNIA STATE TEACHERS'
RETIREMENT SYSTEM
7919 Folsom Boulevard
Sacramento, CA 95826
(916) 229-3500

DAVID L. MUIR
Chief Counsel
LOS ANGELES COUNTY EMPLOYEES
RETIREMENT ASSOCIATION
300 N. Lake Avenue
Suite 620
Pasadena, CA 91101
(626) 564-2348

ROY A. MONGRUE, JR.
General Counsel
TEACHERS' RETIREMENT SYSTEM
OF LOUISIANA
8401 United Plaza Boulevard
Baton Rouge, LA 70809-7017
(225) 925-6446

CHRISTA S. CLARK
Legal Counsel
ARKANSAS TEACHER
RETIREMENT SYSTEM
1400 W. 3rd Street
Little Rock, AR 72201
(501) 682-1266

JAMES G. LINE
General Counsel
SACRAMENTO COUNTY EMPLOYEES'
RETIREMENT SYSTEM
980 9th Street
Suite 1800
Sacramento, CA 95814
(916) 874-9119

ROBERT D. KLAUSNER
KLAUSNER & KAUFMAN, P.A.
10059 N.W. 1st Court
Plantation, FL 33324
(954) 916-1202

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

(7)

06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONER

MICHAEL T. RISHER
ACLU of Northern California
39 Drum Street
San Francisco, California 94111
(415) 621-2493

SUSAN N. HERMAN
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7945

STEVEN R. SHAPIRO
Counsel of Record
EMILY CHIANG
REGINALD T. SHUFORD
ALEXIS AGATHOCLEOUS
DENNIS D. PARKER
American Civil Liberties
Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

(Additional counsel continued on inside cover)

DENNIS COURTLAND HAYES
VICTOR L. GOODE
National Association for the
Advancement of Colored People
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(410) 580-5790

KENNETH KIMERLING
Asian American Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013
(212) 966-5932

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Standard Governing Seizure Used By The California Supreme Court Is Inconsistent With This Court's Fourth Amendment Jurisprudence 6

A. Petitioner Was Seized By The Traffic Stop Because A Reasonable Person In His Circumstances Would Not Have Felt Free To Leave 6

B. The Lower Court Improperly Relied On The Subjective Intent Of The Officer To Conclude That A Reasonable Passenger Would Have Felt Free To Leave 10

II. Failing To Recognize That Passengers Are Seized Will Permit The Use Of Arbitrary And Discriminatory Stops That Offend The Core Principles Of The Fourth Amendment 12

A. The Lower Court's Ruling Would Permit Arbitrary And Discriminatory Stops As To Passengers 12

B. The Lower Court Ruling And The Incentives It Would Create For Law Enforcement Would Disproportionately Affect Minorities 15

i. Stop Rates 16

ii. Search Rates 18

iii. Hit Rates 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases Page

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 13

Arnold v. Ariz. Dep't of Pub. Safety, No. 01-01463 (D. Ariz. 2006) 25

Brendlin v. California, 127 S. Ct. 1145 (2007) 4

Carroll v. United States, 267 U.S. 132 (1925) 14

Chavez v. Ill. State Police, 251 F.3d 612 (7th Cir. 2001) 15

Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723 (N.D. Ohio 2000) 18

Florida v. Bostick, 501 U.S. 429 (1991) 9

Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177 (2004) 7

Hudson v. Michigan, 126 S. Ct. 2159 (2006) 14, 26

I.N.S. v. Delgado, 466 U.S. 210 (1984) 9

Illinois v. Wardlow, 528 U.S. 119 (2000) 8

Martinez v. Mount Prospect, 92 F. Supp. 2d 780 (N.D. Ill. 2000) 25

Maryland v. Pringle, 540 U.S. 366 (2003) 8

Maryland v. Wilson, 519 U.S. 408 (1997) 8

Md. State Conference of NAACP Branches, et al. v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D.Md. 1999) 25

Michigan v. Chesternut, 486 U.S. 567 (1988) 10

People v. Brendlin, 38 Cal. 4th 1107 (Cal. 2006) ..... *passim*

People v. Castellon, 76 Cal. App. 4th 1369 (Cal. Ct. App. 1999) 9

Rodriguez v. Cal. Highway Patrol et al., 89 F. Supp. 2d 1131 (N.D. Cal 2000) 25

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 12, 13

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 12

United States v. Mendenhall, 446 U.S. 544 (1980) 7, 10

United States v. New Jersey, No.99-5970 (D.N.J 1999) 25, 26

Whren v. United States, 517 U.S. 806 (1996) 11, 14

Wilkins v. Md. State Police, No. 93-468 (D. Md. 2003) 25

Wyoming v. Houghton, 526 U.S. 295 (1999) 8

Other Authorities

ATTORNEY GEN. OF THE STATE OF MO., MISSOURI VEHICLE STOPS 2005 ANNUAL REPORT 17, 21, 24

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 2002 (2006) 19, 23

COLORADO STATE PATROL, 2002 TRAFFIC STOP SUMMARY (2004) 20, 23

COMPTROLLER OF THE TN TREASURY, VEHICLE STOPS AND RACE: A STUDY AND RESPONSE TO PUBLIC CHAPTER 910 OF 2000 (2002) 22, 25

DR. GARY CORDNER ET AL., VEHICLE STOPS IN SAN DIEGO: 2001 (2002) 20

ROBIN ENGEL ET AL., UNIV. OF CINCINNATI DIV. OF CRIMINAL JUSTICE, CLEVELAND DIVISION OF POLICE TRAFFIC STOP DATA STUDY: FINAL REPORT (2006) 21

AMY FARRELL & JACK MCDEVITT, INST. RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS 2004-2005 FINAL REPORT (2006) 22, 25

LORIE A. FRIDELL, POLICE EXECUTIVE RESEARCH FORUM, BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS (2004) 18

HOWARD P. GREENWALK, UNIV. OF S. CAL., POLICE VEHICLE STOPS IN SACRAMENTO, CALIFORNIA (2003) 19, 23

INST. RACE & POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS (2003) 17, 24

INST. RACE & POVERTY, REPORT ON TRAFFIC STOP DATA COLLECTED BY THE SAINT PAUL POLICE DEPARTMENT APRIL 15 THROUGH DECEMBER 15, 2000 (2001) 17, 21, 24

JOHN C. LAMBERTH, POLICE FOUND., A MULTIJURISDICTIONAL ASSESSMENT OF TRAFFIC ENFORCEMENT AND DATA COLLECTION IN KANSAS (2003) 16

MD. JUSTICE ANALYSIS CTR., REPORT TO THE STATE OF MARYLAND ON LAW ELIGIBLE TRAFFIC STOPS (2004) 16, 20, 24

David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL. F. 237 (1994) 16

Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1 18

ALEXANDER WEISS & AVIVA GRUMET-MORRIS, NORTHWESTERN UNIV. CTR. PUB. SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY, 2005 ANNUAL REPORT (2006) 20

Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17 18

INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in numerous cases addressing the proper scope of the Fourth Amendment.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has throughout its long history defended and protected the civil liberties of Asian Americans and other minorities. The decision below creates the real possibility that police who stop and search vehicles on the basis of racial profiles will be able to circumvent the protections of the Fourth Amendment.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. As part of that mission, the NAACP has vigorously opposed the use of racial profiling by law enforcement officials to target minority drivers and their passengers. *See, e.g.*, Dr. Dwight Steward & Dr. Douglas Berg, TEXAS STATE CONFERENCE OF NAACP BRANCHES RACIAL PROFILING STUDY: A STATISTICAL EXAMINATION OF RACIAL PROFILING (2000), *available at* http://www.texasnaacp.org/rp.doc. While eliminating racial profiling will require a multi-faceted effort, obtaining meaningful enforcement of the Fourth Amendment by the courts is an essential component to protecting our rights as citizens against unconstitutional stops, searches and seizures.

STATEMENT OF THE CASE

On November 27, 2001, at roughly 1:40 a.m., Sutter County Sheriff's Deputy Robert Charles Brokenbrough stopped a car being driven by Karen Simeroth. *People v. Brendlin*, 38 Cal. 4th 1107, 1111 (Cal. 2006). Earlier that evening, while in the parking lot of a Circle K market, Brokenbrough had noticed that the registration tag on the Buick was expired, but he was informed by dispatch that an application for renewal was "in process" and did not attempt to question the driver of the car or to effect a traffic stop at that time. *Id.* When he later saw the car on Franklin Road, Brokenbrough noticed a temporary operating permit on the car, consistent with the application for renewal, that did not expire until the end of the month. *Id.* He nevertheless pulled the car over for a traffic stop to see whether the temporary

operating permit affixed to the rear window matched the vehicle. *Id.*

In its brief before the California State Supreme Court, the State conceded that Brokenbrough had no reasonable articulable suspicion to stop the car, because "[a] vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit." *Id.* at 1114. The traffic stop was thus unlawful. *Id.*

Bruce Brendlin was a passenger in Simeroth's car. *Id.* at 1111. After the vehicle was pulled over, both Simeroth and Brendlin were asked to identify themselves. *Id.* Because Brokenbrough recognized Brendlin and believed him to be a parolee at large, he contacted dispatch, which informed Brokenbrough that a "no bail" warrant had been issued for Brendlin's arrest. *Id.* Brokenbrough immediately ordered Brendlin out of the car at gunpoint and seized a syringe cap during a search incident to arrest. *Id.* at 1111-12. A subsequent search of the car uncovered various items related to the manufacture of methamphetamine. *Id.*

Brendlin was charged with multiple counts relating to the possession and manufacture of methamphetamine. *See* Petition for Writ of Certiorari at 4, *Brendlin v. California*, No. 06-8120 (U.S. Nov. 28, 2006). The trial court denied his motion to suppress, but the California Court of Appeal reversed, finding that, because Brendlin had been detained by the traffic stop within the meaning of the Fourth Amendment, he was entitled to have the evidence against him suppressed as the fruit of the unlawful stop. *Brendlin*, 38 Cal. 4th at 1112-13. The California Supreme Court disagreed. It held that because Brendlin was a passenger in the car and not the driver, he had not been seized by the traffic stop as a constitutional matter because he was "free to ignore the

police presence and go about his . . . business." *Id.* at 1117. Thus, even though the evidence against Brendlin would not have been uncovered but for the concededly illegal stop, and even though it was inadmissible against the driver, the court held that he was not entitled to suppression. *Id.* at 1123.

This Court granted certiorari to decide the following question: Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop. *Brendlin v. California*, 127 S. Ct. 1145 (2007).

SUMMARY OF ARGUMENT

The California Supreme Court's ruling that Brendlin was not seized by the traffic stop at issue is flawed in two pivotal ways. First, the lower court erroneously assumed that a reasonable person in Brendlin's situation would have felt free to leave the car when it was initially pulled over — a holding that defies common sense, not least because the stop had no reasonable or identifiable purpose. Second, contrary to this Court's unambiguous precedent, the California Supreme Court improperly relied upon the police officer's subjective intent in order to determine whether and when the seizure occurred.

Because Petitioner's Brief will discuss both of these issues in detail, *amici* will address them only briefly. Instead, this brief will focus upon the impact an affirmance of the lower court's ruling would have on arbitrary and illegal stops and searches based on race, *i.e.*, on the practice of racial profiling. The California Court's ruling threatens to leave

Fourth Amendment protections, but would have particularly pernicious consequences for minority passengers.

ARGUMENT

I. THE STANDARD GOVERNING SEIZURE USED BY THE CALIFORNIA SUPREME COURT IS INCONSISTENT WITH THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE.

A. Petitioner Was Seized By The Traffic Stop Because A Reasonable Person In His Circumstances Would Not Have Felt Free To Leave.

The California Supreme Court's premise that Brendlin "knew he was free to ignore the police presence and go about his business . . . even if he was unable as a practical matter to leave the scene until the car came to halt," 38 Cal. 4th at 1121, is inconsistent with the facts of this case, this Court's precedent, and realistic assessments about a reasonable passenger's perception of what he is permitted to do when subjected to a traffic stop.

According to the state supreme court, "[a]bsent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot — i.e., exit the vehicle . . . and thereby terminate the encounter with the officer." *Brendlin*, 38 Cal. 4th at 1120. Setting aside the myriad individual circumstances under which this proposition is arguably untrue — for example, when there is inclement weather, the stop is conducted late at night (as was the case here), or the stop is conducted on the side of a busy highway — it is plain that a reasonable person would ordinarily not believe that he is simply free to leave a car that has been pulled over by law

enforcement until there is some indication that this is the case.[2]

That is especially true when, as here, the stop is unsupported by any legitimate law enforcement purpose. Because Simeroth had not in fact been violating any traffic laws, neither Simeroth nor Brendlin had any reason to know why the car had been pulled over, and thus no way of knowing who or what the police were investigating. Under the circumstances, it was entirely reasonable for both to assume that they had been seized by the police and that neither was free to leave the car. The objective reasonableness of that perception was reinforced in this case when Brendlin was asked to identify himself as soon as the officer approached the car. *Brendlin*, 38 Cal. 4th at 111.[3]

---

[2] This Court's decision in *Mendenhall* notes that her encounter with DEA agents at the airport might "reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males." The Court goes on to acknowledge the relevance of those factors but concludes that the totality of the evidence in the case supported a finding of consent. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980). It is difficult to imagine any conceivable traffic stop under which any reasonable passenger — much less a person of color, or a person without a college education, or a young woman pulled over by two male law enforcement officers — would feel free simply to walk away from the car without assurance from the police that doing so was acceptable.

[3] *Cf. Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 182-83 (2004) (identifying 21 states where a person may be subject to criminal penalty for refusing to identify himself to a police officer after a lawful stop).

This Court, moreover, has recently held that a passenger can be arrested based on contraband found in a stopped car, *Maryland v. Pringle*, 540 U.S. 366, 374 (2003), and that a passenger's personal effects are subject to search if there is probable cause to search the car, *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999). The Court has justified these rulings on the ground that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing." *Pringle*, 540 U.S. at 373 (quoting *Houghton*, 526 U.S. at 304-05). If the nexus of a car and its occupants is close enough to support the arrest of a passenger or search of a passenger's effects, it is surely close enough for a reasonable passenger to believe that he is not a mere bystander who is free to leave once the car is stopped.

Additionally, a reasonable passenger who knows that the officer can order him out of the car even if he does not wish to exit, *Maryland v. Wilson*, 519 U.S. 408, 410 (1997), may not only feel subject to the officer's authority, but fear the possible consequences of suddenly exiting the car without permission in the event that his attempt to leave is misconstrued by the police officer as a threat to the officer's or the public's safety.

Finally, the claim that passengers have not been seized also defies reality and common sense in another typical traffic stop scenario, when the officer approaches the car and asks for consent to search the vehicle. At that point, a reasonable passenger is likely to know that any rapid exit from the car — particularly if it is stopped in a high crime area — may itself constitute a basis for reasonable suspicion and hence further police action. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Passengers in California, like

Brendlin, have even more reason to believe this is the case. The California Court of Appeal has explicitly stated that its precedent does not "stand for the proposition that after a traffic stop, the officer must stand by while the doors of the vehicle fly open and passengers leave in all directions." *People v. Castellon*, 76 Cal. App. 4th 1369, 1376 n.2 (Cal. Ct. App. 1999).

For all these reasons, it is entirely reasonable for passengers like Brendlin to conclude that they are not initially free to leave a car that has been pulled over by law enforcement. In fact, the situation of a car passenger like Brendlin is far different from that of petitioners in *Florida v. Bostick*, 501 U.S. 429 (1991), or *I.N.S. v. Delgado*, 466 U.S. 210 (1984), whose "freedom of movement was restricted by a factor independent of police conduct." *Bostick*, 501 U.S. at 436. In *Bostick*, petitioner was on a bus about to depart on a long distance trip and so would not have felt free to leave even if the police had not boarded the bus. *Id.* at 436. Similarly, in *Delgado*, petitioners were at work during normal working hours and were thus confined by virtue of that fact. 466 U.S. at 218. In contrast, a passenger in a car that has just been pulled over cannot be said to be free to go about his business, for his business was to continue in his travels in that car; instead, he has been brought to a halt solely by police conduct.[4]

---

[4] This analysis does not mean that the initial seizure of a passenger created by virtue of a traffic stop is *per se* unreasonable; when there is reasonable suspicion to effect the traffic stop, *i.e.* the stop is lawful, the initial seizure of the passenger will be just as lawful as that of the driver. How long the seizure of a passenger may continue must depend on the totality of the circumstances in each case.

This analysis comports with the common sense assumptions reasonable people have regarding their rights during a traffic stop by recognizing that passengers like Brendlin are just as seized for Fourth Amendment purposes as the driver of the stopped car. It thus also means that passengers like Brendlin who have been subjected to an unlawful stop can vindicate their Fourth Amendment right to be free from unreasonable seizure in a court of law. Should this Court disagree, and find that all passengers are indeed initially free to leave a car as soon as it has been pulled over for a traffic stop, it should announce that holding unambiguously. Absent that clear holding, reasonable passengers will continue to believe that they are not free to leave until the police indicate otherwise.

B. The Lower Court Improperly Relied On The Subjective Intent Of The Officer To Conclude That A Reasonable Passenger Would Have Felt Free To Leave.

It is well settled that "a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554; *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) ("This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."). It is also clear that the seizure determination is to be made from the point of view of the person who is the object of the officer's attentions, rather than from that of the officer. *Mendenhall*, 446 U.S. at 555 n.6 ("[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted

to leave, is irrelevant except insofar as that may have been conveyed to the respondent."); *cf. Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Although the lower court opinion begins with an accurate recitation of the standard for determining whether a seizure has taken place, the one the court actually applied functionally eviscerates this Court's holding in *Mendenhall* by placing excessive emphasis on police officer intent. The California Supreme Court's inquiry referred throughout to the subjective intent of the police officer despite the fact that that intent was neither communicated to Brendlin nor would have been apparent to a reasonable person in his position. The court asserted, for example, that "Deputy Brokenbrough's flashing lights were directed at the driver, Karen Simeroth, and not at defendant." *Brendlin*, 38 Cal. 4th at 1118. A reasonable passenger, however, has no conceivable means of knowing at whom an officer's flashing lights are directed, particularly where, as here, there were no lawful grounds for the stop. Indeed, the lower court went so far as to state, "[w]e think it more sensible to leave it up to the officer, once cause for the vehicle stop has been established, to decide who should be seized and when." *Id.* at 1121 n.4.

The lower court's logic would place the determination of when a seizure has occurred squarely within the hands of officers themselves, who would be free to testify to their subjective intentions about whether and when a particular person was seized, regardless of whether those intentions were apparent. The protection afforded by the Fourth Amendment against unreasonable seizures becomes meaningless if police officers themselves are permitted to

provide *post hoc* determinations of whether and when a particular person had been seized — and thereby functionally to decide who is to be afforded Fourth Amendment protection.

The incentive for law enforcement officers simply to assert in all cases that the passengers at issue were not seized until after evidence was uncovered against them will be great, and perfectly lawful, if the lower court's rule is upheld. The problem raised by this possibility is precisely the reason why this Court has heretofore insisted upon an objective reasonableness standard from the point of view of the person confronted.

II. Failing To Recognize That Passengers Are Seized Will Permit The Use Of Arbitrary And Discriminatory Stops That Offend The Core Principles Of The Fourth Amendment.

A. The Lower Court's Ruling Would Permit Arbitrary And Discriminatory Stops As To Passengers.

Although the issue before this Court is whether Brendlin was seized and not whether that seizure was in fact reasonable, the *per se* unreasonableness of the stop to which he was subjected is nevertheless relevant to this Court's inquiry.

The Fourth Amendment clearly prohibits both arbitrary and discriminatory seizures. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); *United States v. Brignoni-Ponce*, 422 U.S.

873, 878 (1975). Although the reasonableness of a seizure depends upon "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers," *id.*, there is simply no legitimate public interest in arbitrary or discriminatory stops, and they are accordingly unlawful. Such stops are not, and should not, be shielded from Fourth Amendment scrutiny.

It is axiomatic that the driver of a vehicle that was arbitrarily or discriminatorily stopped may vindicate her Fourth Amendment rights, for example, via a motion to suppress evidence that would not have been gathered but for the stop. Should this Court affirm the California court's ruling, however, any evidence gathered against passengers in the very same car will be admissible even though it too was the product of an unlawful stop. The lower court's ruling would create the incongruous situation in which the same evidence gathered from the same concededly unlawful stop, which affected both driver and passenger equally, could be used against one person in the car but not another. It would functionally permit baseless stops with respect to a whole class of people: passengers.

The California Supreme Court's ruling creates an incentive for law enforcement to take advantage of that incongruity. Because evidence uncovered as a result of an arbitrary or discriminatory stop would still be admissible against passengers, law enforcement officers will have little reason to curtail such stops. This is not an incentive structure that the Fourth Amendment was designed to tolerate; an increase in arrests and convictions may result, but at a price this Court has already repeatedly rejected. *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (finding a roving Border Patrol stop and search without

probable cause or reasonable suspicion unconstitutional under the Fourth Amendment); *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

In *Whren*, this Court suggested that allegations of racial profiling can be addressed through an Equal Protection claim seeking damages and injunctive relief. 517 U.S. at 813. This Court did not suggest, however, that a Fourth Amendment violation and an Equal Protection violation represent the same constitutional injury, or that redress for one provides satisfactory redress for the other. Rather, the Court held in *Whren* that there had been no Fourth Amendment violation to redress because the car stop at issue there was lawful. *Id.* Here, by contrast, the car stop was concededly unlawful.

Unlike the knock-and-announce violation in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), moreover, the unlawful car stop in this case involved more than an issue of timing. The entry into Hudson's home would only have been delayed for a few seconds had the officers properly knocked and announced their presence. Brendlin, on the other hand, would never have been seized as part of the car stop if the police in this case had complied with the Fourth Amendment. The increased threat to privacy creates a correspondingly increased need for an effective deterrent against police misconduct.

Furthermore, the fact that someone else in the vehicle may bring a constitutional claim to remedy systemic deficiencies (*i.e.*, the driver), does not mean that others who

have suffered from the same Fourth Amendment violation should be unable to do so — particularly where, as here, the two parties may have wholly different legal interests.

Finally, the necessity of showing a pattern and practice of racial discrimination can be nearly insurmountable for individuals, much less a showing of actual discriminatory intent. *See, e.g., Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001). There will also be individuals who do not wish to file a civil action or do not have a civil claim, but rather only seek to exclude evidence that was gathered against them perhaps as the result of a racially suspect stop and search.

B. The Lower Court Ruling And The Incentives It Would Create For Law Enforcement Would Disproportionately Affect Minorities.

The incentive the California court ruling creates for police officers to engage in arbitrary stops would, of course, affect all passengers. But the discriminatory stops and attendant searches it would newly permit with respect to passengers will have particular resonance for minority motorists. Statistical evidence tells us that minority passengers will be disproportionately affected by a ruling that bars passengers in general from challenging unlawful stops and by any increase in the number of unlawful stops that result from such a ruling. Some data indicates that minority motorists are stopped at higher rates than their white counterparts. Much more data establishes that minority motorists are disproportionately subjected to searches once they have been stopped — even though searches of minorities are not any more likely to uncover evidence of criminal wrongdoing than searches of whites. A disproportionate number of minority passengers will

accordingly be left without Fourth Amendment recourse when subjected to discriminatory stops if this Court affirms the lower court's ruling.

i. Stop Rates

There is some evidence that cars with African American occupants are more likely to be stopped, even when there is no law enforcement incentive to engage in arbitrary or discriminatory stops.[5] For example:

- *Kansas*: In a multijurisdictional report on traffic stops, the Police Foundation found that, of the seven Kansas police departments assessed, "all are targeting either Blacks or Hispanics and three of the six who were assessed for both Blacks and Hispanics are targeting both."[6]
- *Maryland*: In an official report to the State, the Maryland Justice Analysis Center found that 36% of all stops in Maryland were of African Americans. The report concluded that "the fact that 36% of all the law eligible stops involved a black driver does raise concerns given that the population in Maryland is 28% black."[7]
- *Minnesota*: A statewide survey found that all minority populations, except Asians, were stopped at a higher rate

---

[5] *See generally*, David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL. F. 237, 250 (1994) (discussing evidence of racial disparity in traffic stops).

[6] JOHN C. LAMBERTH, POLICE FOUND., A MULTIJURISDICTIONAL ASSESSMENT OF TRAFFIC ENFORCEMENT AND DATA COLLECTION IN KANSAS 143 (2003), *available at* http://www.racialprofilinganalysis.neu.edu/IRJ_docs/KS_2003.pdf.

[7] MD. JUSTICE ANALYSIS CTR., REPORT TO THE STATE OF MARYLAND ON LAW ELIGIBLE TRAFFIC STOPS 8 (2004), *available at* http://www.mdle.net/traffic/2004report.pdf [hereinafter MARYLAND REPORT].

than whites. African American motorists were stopped at the highest rate — over three and a half times more often than white motorists.[8]

- *Minnesota (St. Paul)*: A 2001 study by the Institute on Race & Poverty concluded that African Americans in St. Paul, Minnesota, were stopped in disproportionately high numbers compared to their proportion of the city's adult population. Whites, who represented 73.18% of the population, accounted for only 57.67% of all stops whereas African Americans, who represented 10.22% of the population, accounted for 26.25% of all stops.[9]

- *Missouri*: The state Attorney General reported that African Americans in Missouri represent 10.6% of the adult population but 15.1% of all vehicle stops. In other words, African Americans are stopped at a rate 42% higher than expected based solely on their proportion of the adult population. African Americans were 46% more likely than whites to be stopped in 2005.[10]

There is also evidence that, despite this Court's admonitions more than 30 years ago in *Brignoni-Ponce* and *Almeida-Sanchez*, traffic stops are also being conducted on

---

[8] INST. RACE & POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 10 (2003), *available at* http://www.irpumn.org/uls/resources/projects/aggregate%20report%2092303.pdf [hereinafter MINNESOTA REPORT].

[9] INST. RACE & POVERTY, REPORT ON TRAFFIC STOP DATA COLLECTED BY THE SAINT PAUL POLICE DEPARTMENT APRIL 15 THROUGH DECEMBER 15, 2000 4-6 (2001), *available at* http://www1.umn.edu/irp/SPPD0522.pdf [hereinafter ST. PAUL REPORT]

[10] ATTORNEY GEN. OF THE STATE OF MO., MISSOURI VEHICLE STOPS 2005 ANNUAL REPORT, *available at* http://www.ago.mo.gov/racialprofiling/2005/racialprofiling2005.htm#findings [hereinafter MISSOURI REPORT].

people suspected of being Mexican in order to check their immigration status.[11]

Although other jurisdictions have not reported any racial discrepancies in their stop rates, there is good reason to believe that such discrepancies are underreported because of the use of unadjusted census data. Many stop rate studies use the proportion of minorities in the general population as a baseline in order to assess racial discrepancies. As the Police Executive Research Forum notes, however, stop rates calculated using such data do not take into account the fact that the proportion of minorities who own and use vehicles may be smaller than the proportion of that minority group in the population at large.[12] Seemingly benign stop rates may thus actually mask racially biased policing. In addition, increased police discretion to engage in unlawful stops with impunity with respect to passengers may well result in further racial discrepancies in stop rates.

ii. Search Rates

Even if the rate at which minorities and whites are stopped were identical, the evidence that race matters once a car has been stopped is striking. In a national survey published in 2006, the United States Department of Justice found that African Americans were nearly three times as

---

[11] *See, e.g., Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 737 (N.D. Ohio 2000); Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17; Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1.

[12] LORIE A. FRIDELL, POLICE EXECUTIVE RESEARCH FORUM, BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS 75 (2004), *available at* http://www.justice.utah.gov/Research/Race/PERF%20by%20the%20Numbers.pdf.

discretionary form of search. African American drivers represented 16.1% of consent searches, "well above their 10.4% portion of vehicle stops." Hispanic representation in consent search rates was also disproportionate — 32.5% of consent searches compared to 27.7% of stops.[16]

- *Colorado*: Of individuals stopped by the State Patrol in 2002, Hispanic drivers comprised 15% of those stopped, but over 30% of those searched.[17]

- *Illinois*: In 2006, a state-sponsored study of the prior year's traffic stops revealed that minority motorists were more likely to be subjected to a consent search than white motorists. The survey concluded that "in spite of the fact that there are fewer consent searches [than in 2004], application of consent searches by race has become more problematic."[18]

- *Maryland*: A 2004 statewide survey of traffic stops in Maryland established that the highest rate of searches was for Hispanic males (9.9% stopped are searched) followed by African American males (7.5%), and white males (5.6%).[19]

- *Minnesota (St. Paul)*: According to data gathered by the St. Paul Police Department, after being stopped, African

---

[16] DR. GARY CORDNER ET AL., VEHICLE STOPS IN SAN DIEGO: 2001 8 (2002), *available at* http://www.sandiego.gov/police/pdf/stoprpt.pdf.

[17] COLORADO STATE PATROL, 2002 TRAFFIC STOP SUMMARY 8 (2004), *available at* http://csp.state.co.us/Upload/03trafficstopdata.pdf [hereinafter COLORADO REPORT].

[18] ALEXANDER WEISS & AVIVA GRUMET-MORRIS, NORTHWESTERN UNIV. CTR. PUB. SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY, 2005 ANNUAL REPORT 7 (2006), *available at* http://www.dot.state.il.us/trafficstop/2005annualreport.pdf.

[19] MARYLAND REPORT, *supra* note 7, at 9.

Americans, Hispanics and Native Americans in St. Paul, Minnesota, are subjected to pat down searches of their persons and searches of their vehicles at rates higher than the search rates for white drivers. For example, in searches that produced no contraband whatsoever, 19.6% of African Americans and 16.7% of Hispanics, but only 8.4% of whites, were patted down and had their vehicles searched.[20]

- *Missouri*: The 2005 Annual Report of the Attorney General's Office found that, across the state of Missouri, African Americans were 1.78 times more likely to be searched than whites and Hispanics 1.98 times more likely.[21]

- *Ohio (Cleveland)*: A 2006 University of Cincinnati report found that, even after controlling for other relevant factors, a driver's race has a "significant influence over whether or not searches are conducted [in Cleveland]. The odds of being searched are 1.3 times higher for Black drivers compared to Caucasian drivers." The report also found that African American motorists were more likely to be searched for discretionary reasons.[22]

- *Rhode Island*: An official review of statewide traffic stops in Rhode Island found that 2.9% of whites but 5.9% of non-whites were subject to a discretionary search upon being stopped by the police. In other words, "non-whites are significantly more likely than whites to be subjected

---

[20] SAINT PAUL REPORT, *supra* note 9, at 4, 15.

[21] MISSOURI REPORT, *supra* note 10.

[22] ROBIN ENGEL ET AL., UNIV. OF CINCINNATI DIV. OF CRIMINAL JUSTICE, CLEVELAND DIVISION OF POLICE TRAFFIC STOP DATA STUDY: FINAL REPORT xiii (2006), *available at* http://www.uc.edu/criminaljustice/ProjectReports/Cleveland_Traffic_Stop_Study.pdf.

to a discretionary search. Statewide, the odds of a non-white motorists [sic] being searched are roughly twice that of a white driver being searched."[23]

- *Tennessee*: A statewide survey of traffic stops in Tennessee found that police officers searched 16.8% of Hispanics stopped, 8.1% of African Americans, and 5.8% of whites. When stopping vehicles for moving violations, officers searched 14.1% of Hispanics, 5.7% of African Americans, and 4.4% of whites. When stopping vehicles for vehicle equipment violations, officers searched 20.3% of Hispanics, 12.7% of African Americans, and 8.3% of whites.[24]

A rule that bars passengers from challenging the unlawfulness of a stop (and the admissibility of the fruits of that stop) would disproportionately affect minorities because minority motorists are disproportionately searched. While the rule announced by the California high court has troubling implications for all passengers — particularly given the incentive it provides to law enforcement to increase the number of unreasonable stops in the hopes of gathering otherwise inadmissible evidence — minorities will be particularly affected given the reality of disproportionate search rates.

---

[23] AMY FARRELL & JACK MCDEVITT, INST. RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS 2004-2005 FINAL REPORT 2 (2006), *available at* http://www.rijustice.ri.gov/sac/Executive%20Summary%202004-2005.pdf [hereinafter RHODE ISLAND REPORT].

[24] COMPTROLLER OF THE TN TREASURY, VEHICLE STOPS AND RACE: A STUDY AND RESPONSE TO PUBLIC CHAPTER 910 OF 2000 15-16 (2002), *available at* http://www.comptroller.state.tn.us/orea/reports/racialprofiling.pdf [hereinafter TENNESSEE REPORT].

iii. Hit Rates

Such an outcome might be justified by law enforcement if the widespread disparity in search rates between different racial groups reflected the rates at which those populations violate the law. Studies over the last several years, however, have consistently found *no difference in contraband discovery rate across race* — clear cut proof that racial profiling not only offends core constitutional principles, but is also an ineffective law enforcement strategy. The DOJ, for example, recently concluded that despite the differences in search rates across race, "no measurable differences were found in the likelihood of arrest among white, black, and Hispanic male drivers."[25] Again, this pattern is consistently repeated throughout the United States:

- *California (Sacramento)*: Despite finding variation among search rates across race, a University of Southern California study of traffic stops in Sacramento, California, established that contraband is found at similar rates across race, with African Americans (22.4%) having the lowest rate compared to Hispanics (27.9%) and whites (26.4%).[26]

- *Colorado*: In 2002, whites were more likely to have a seizure of contraband or property during traffic stops when compared to the number of searches that took place. Meanwhile, Hispanics were the *least* likely group to have contraband or property seized during a traffic stop, despite being the group *most* likely to be searched.[27]

---

[25] BUREAU OF JUSTICE STATISTICS, *supra* note 13, at 6.

[26] SACRAMENTO REPORT, *supra* note 15, at 8, 34.

[27] COLORADO REPORT, *supra* note 17, at 14.

- *Maryland*: Despite disproportionate search rates involving motorists of color in this state, nothing is seized in 84% of searches of African Americans, 89% of searches of Hispanics, and 83% of whites. There also does not appear to be any meaningful difference in the number of arrests subsequent to stops for blacks and whites.[28]

- *Minnesota*: While 12.61% of African American motorists who were stopped were searched compared to 3.14% of white motorists, contraband was discovered at a rate of 11.17% for African Americans and 23.53% for whites. Similarly, Latinos accounted for 8.55% of searches, but only 9.08% of contraband hits — far below the contraband hit rate for white motorists.[29]

- *Minnesota (St. Paul)*: African Americans, Hispanics and Native Americans were far more likely than whites to be subject to pat down searches and vehicle searches in which no contraband was found. No contraband was found in 19.6% of searches involving African Americans, 16.7% of Hispanics, 16.6% of Native Americans, and 8.4% of whites.[30]

- *Missouri*: In 2005, the contraband hit rate for whites was 23.6%, compared with 18.6% of African Americans and 14.5% for Hispanics. The Attorney General's Office concluded that "this means that on average, searches of African Americans and Hispanics are less likely than searches of whites to produce contraband."[31]

---

28 MARYLAND REPORT, *supra* note 7, at 10-11.

29 MINNESOTA REPORT, *supra* note 8, at 22.

30 SAINT PAUL REPORT, *supra* note 9, at 15.

31 MISSOURI REPORT, *supra* note 10.

- *Rhode Island*: White contraband rates in this state are 26.5%, and non-white rates are 22.3%.[32]

- *Tennessee*: As a result of searches in Tennessee, officers seized evidence from 1.8% of Hispanics, 1.6% of African Americans, and 1.2% of whites.[33]

This data establishes that there is no law enforcement rationale to which this Court should defer in considering the racial profiling implications of this case. This Court should not affirm a rule that would leave minorities, who are subjected to disproportionate search rates but do not disproportionately offend, without any Fourth Amendment protections to challenge flatly discriminatory stops and searches.

The Fourth Amendment currently provides an avenue of redress for those subjected to discriminatory stops and searches, whether via a suppression motion or a civil claim challenging racial profiling practices.[34] And, as this Court

---

[32] RHODE ISLAND REPORT, *supra* note 23, at 3.

[33] TENNESSEE REPORT, *supra* note 24, at 18.

[34] A number of suits contesting racial profiling practices have resulted in consent decrees or judicial orders that require police departments to collect relevant data, implement officer training programs, and prohibit officers from pulling motorists over on the basis of race or skin color. *See, e.g.*, *Wilkins v. Md. State Police*, No. 93-468 (D. Md. 2003), *available at* http://www.mdsp.org/downloads/consent_decree.pdf; *Arnold v. Ariz. Dep't of Pub. Safety*, No. 01-01463 (D. Ariz. 2006), *available at* http://www.azdps.gov/SettlementAgreement.pdf; *Rodriguez v. Cal. Highway Patrol et al.*, 89 F. Supp. 2d 1131 (N.D. Cal 2000); *Martinez v. Mount Prospect*, 92 F. Supp. 2d 780 (N.D. Ill. 2000); *United States v. New Jersey*, No.99-5970 (D.N.J 1999), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm. Moreover, courts have consistently approved of the use of the Fourth Amendment to redress allegations of racial profiling. *See, e.g.*, *Md. State Conference of*

has recognized, these court actions can have particular bite when they are coupled with a § 1983 claim. *See, e.g.*, *Hudson v. Michigan*, 126 S. Ct. at 2167-68 ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). A ruling that forecloses a legal remedy under the Fourth Amendment for passengers would gut the primary deterrent to such behavior.

It would be unfortunate if after the great strides the lower courts in this country have made to combat racial profiling via the judicial system — and the great strides the states have made to combat racial profiling via increased data collection and reporting — this Court were inadvertently to re-open a door that should properly be closed.

NAACP Branches, et al. v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999).

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

STEVEN R. SHAPIRO
Counsel of Record
EMILY CHIANG
REGINALD T. SHUFORD
ALEXIS AGATHOCLEOUS
DENNIS D. PARKER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500

MICHAEL T. RISHER
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493

SUSAN N. HERMAN
250 Joralemon Street
Brooklyn, NY 11201
Telephone: (718) 780-7945

DENNIS COURTLAND HAYES
VICTOR L. GOODE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215
Telephone: (410) 580-5790

KENNETH KIMERLING
ASIAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
99 Hudson Street
New York, NY 10013
Telephone: (212) 966-5932

Dated: March 5, 2007

No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE SUPPORTING PETITIONER

PAMELA HARRIS
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
10th Floor
Washington, DC 20006
(202) 383-5386

FRANCES H. PRATT
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
1650 King Street
Alexandria, VA 22314
(703) 600-0815

JONATHAN E. NUECHTERLEIN
Counsel of Record
SAMBHAV SANKAR
HEATHER ZACHARY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

QUESTION PRESENTED

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. A TRAFFIC STOP INHERENTLY SUBJECTS A PASSENGER TO A SEIZURE BY INTERFERING WITH HIS FREEDOM OF MOVEMENT 6

II. A PASSENGER IN A TRAFFIC STOP REMAINS "SEIZED" UNTIL HE HAS RECEIVED SOME OBJECTIVE INDICATION THAT HE IS FREE TO LEAVE AND IT IS SAFE FOR HIM TO DO SO 11

A. A Passenger Remains Seized If He Has Received No Indication That He Is Free To Leave 12

B. A Passenger Remains Seized If He Cannot Prudently Leave The Site Of The Traffic Stop 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Page(s)

Berkemer v. *McCarty*, 468 U.S. 420 (1984) 7, 8
Brower v. *County of Inyo*, 489 U.S. 593 (1989) 10
California v. *Hodari D.*, 499 U.S. 621 (1991) 9, 10
Colorado v. *Bannister*, 449 U.S. 1 (1980) 7
County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 10
Davis v. *Gracey*, 111 F.3d 1472 (10th Cir. 1997) 7
Delaware v. *Prouse*, 440 U.S. 648 (1979) 7
Florida v. *Bostick*, 501 U.S. 429 (1991) 9, 17
Florida v. *Royer*, 460 U.S. 491 (1983) 9
INS v. *Delgado*, 466 U.S. 210 (1984) 17
Maryland v. *Wilson*, 519 U.S. 408 (1997) 8, 12, 13
People v. *Roth*, 85 P.3d 571 (Colo. Ct. App. 2003) 15
Rakas v. *Illinois*, 439 U.S. 128 (1978) 11
Reid v. *Georgia*, 448 U.S. 438 (1980) 6
Rogala v. *District of Columbia*, 161 F.3d 44 (D.C. Cir. 1998) 13
State v. *Hodges*, 631 N.W.2d 206 (S.D. 2001) 13
Tennessee v. *Garner*, 471 U.S. 1 (1985) 6
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 15
United States v. *Clark*, 337 F.3d 1282 (11th Cir. 2003) 13
United States v. *Drayton*, 536 U.S. 194 (2002) 9, 17
United States v. *Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998) 7
United States v. *Grant*, 349 F.3d 192 (5th Cir. 2003) 7
United States v. *Hensley*, 469 U.S. 221 (1985) 7
United States v. *Jacobsen*, 466 U.S. 109 (1984) 6
United States v. *Johns*, 891 F.2d 243 (9th Cir. 1989) 11
United States v. *Kimball*, 25 F.3d 1 (1st Cir. 1994) 7
United States v. *Lopez*, 710 F.2d 1071 (5th Cir. 1983) 15
United States v. *Mendenhall*, 446 U.S. 544 (1980) 9
United States v. *Moorefield*, 111 F.3d 10 (3d Cir. 1997) 13

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Mosley*, 454 F.3d 249 (3d Cir. 2006) 7, 11
United States v. *Place*, 462 U.S. 696 (1983) 7
United States v. *Rodriguez-Diaz*, 161 F. Supp. 2d 627 (D. Md. 2001) 15
United States v. *Twilley*, 222 F.3d 1092 (9th Cir. 2000) 7
United States v. *Williams*, 419 F.3d 1029 (9th Cir.), *cert. denied*, 126 S. Ct. 840 (2005) 13
Whren v. *United States*, 517 U.S. 806 (1996) 7, 8
Wilson v. *State*, 734 So. 2d 1107 (Fla. Dist. Ct. App. 1999) 13
Wong Sun v. *United States*, 371 U.S. 471 (1963) 11

STATUTES

N.Y. Veh. & Traf. Law § 1229-a 16
Ohio Rev. Code Ann. § 4511.051 16

OTHER AUTHORITIES

AAA Foundation for Traffic Safety, Report Summary—Pedestrian Fatalities on Interstate Highways: Characteristics and Countermeasures (1997), *available at* http://www.aaafoundation.org/pdf/fatalped.pdf (last visited Mar. 4, 2007) 16

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE SUPPORTING PETITIONER

INTERESTS OF AMICI CURIAE[1]

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide, along with eighty state and local affiliate organizations numbering 28,000 members in all fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure

[1] Pursuant to Rule 37.6, amici curiae state that no counsel for a party authored any part of this brief, and no person or entity, other than the amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as amicus curiae in litigation relating to criminal-law issues, particularly those issues that affect indigent defendants in federal court. The Association has appeared as amicus curiae in litigation before this Court and the federal courts of appeals.

STATEMENT

Around 1:40 a.m. on November 27, 2001, petitioner was riding in a car driven by Karen Simeroth when a police car behind them activated its lights and forced them to the side of the road. Pet. App. 35. The officer—Sutter County Sheriff's Deputy Robert Brokenbrough—had noticed several hours earlier that the car (then parked in a convenience store lot) had expired registration tags. *Id.* at 105, 113. Although the officer observed that the car had a valid temporary operating permit, he decided to pull the car over anyway when he saw it on the road later that night. *Id.* at 67. The State now concedes that this stop was unjustified and unlawful. *Id.* at 38-39.

After turning on a floodlight to illuminate the scene (Pet. App. 108), the officer approached the stopped car and asked Ms. Simeroth for her driver's license (*id.* at 35). He then asked petitioner to identify himself as well, because he immediately "recognized [petitioner] as one of [two] Brendlin brothers . . . and recalled that one of them had absconded from parole supervision." *Id.* at 35.

The officer walked back to his patrol car, from which, standing outside the passenger door, he ran a police-radio check on petitioner. Pet. App. 112. As the officer watched petitioner tentatively open his car door, he became "concern[ed]" that petitioner might try "to flee from that location from the vehicle." *Id.* at 122. Indeed, the officer was sufficiently concerned that he requested police backup even before he had confirmed that petitioner was the absconded parolee he appeared to be. *Id.* Petitioner nonetheless closed the door and remained in the car, evidently concluding that an escape attempt would be futile.

Within minutes, the officer confirmed that petitioner was, in fact, Bruce Brendlin and that there was a warrant for his arrest. Pet. App. 35, 67-68. The officer ordered him out of the car at gunpoint and arrested him. *Id.* at 35. A search revealed a syringe cap on petitioner's person. *Id.* at 36. In a subsequent search of the driver and car, the officer discovered two syringes, one of which was missing a cap, as well as drugs and related materials. *Id.* at 35, 94-98.

Petitioner was charged with multiple drug counts under California law. At his trial, he argued that the evidence discovered through the traffic stop should be suppressed as the fruit of his illegal seizure. Pet. App. 36. The trial court denied this suppression motion, and petitioner entered a guilty plea subject to an appeal on the suppression issue. *Id.* The intermediate state court of appeals then reversed on that issue, reasoning that a passenger is seized within the meaning of the Fourth Amendment when the car in which he is riding is pulled over for a traffic stop. *Id.* at 72-73. The court held that, because the traffic stop was unlawful, and because all of the evidence against petitioner was discovered as a direct consequence of that unlawful stop, the drug evidence should have been suppressed as "fruit of the poisonous tree." *Id.* at 75 (internal quotation marks omitted).

The California Supreme Court reversed and reinstated petitioner's conviction. It reasoned that a passenger in a car stopped by police is generally not "seized" in a routine traffic stop. Pet. App. 34, 45-46. Because the court determined

that the stop had not violated petitioner's Fourth Amendment rights, it did not address the application of the exclusionary rule in these circumstances. *See id.* at 34, 52.

SUMMARY OF ARGUMENT

The question presented in this case is whether, in making a traffic stop that "seizes" the driver and her vehicle for Fourth Amendment purposes, an officer also seizes the passengers in that vehicle. That question can be divided into two parts. *First*, is a passenger subjected to a seizure when the police force the car in which he is riding over to the side of the road? *Second*, if so, how long does that seizure last? Does it end a few moments after the car comes to a stop, when the passenger has had time to unfasten his seat belt, open the door, and step out of the car; or does it continue until the passenger receives some objective indication that he may walk away and determines that he may safely do so?

1. On the first issue, there can be no serious question that the police "seized" petitioner, at least momentarily, when they forced the car in which he was riding to the side of the road. Under established precedent, police officers "seize" an individual whenever they cause any meaningful interference, however brief, with his freedom of movement. A traffic stop inarguably interferes with the freedom of movement of the driver and passenger alike by precluding them from continuing to travel towards their agreed-upon destination. This interference is most obvious during the period in which the car is coming to a stop, because a passenger obviously cannot leave the scene during that interval unless he throws himself from a moving vehicle.

2. To resolve this particular case, it is not strictly necessary for this Court to decide *how long* petitioner remained seized after the car came to rest, because the evidence petitioner seeks to suppress is the tainted fruit of the initial phase of this unlawful traffic stop. Nonetheless, this Court should give needed guidance to courts and law enforcement authorities by clarifying that, during a traffic stop, a passenger remains seized for Fourth Amendment purposes until

(a) he has received some objective indication that he is free to leave and (b) he can safely and practically do so.

a. Citing concerns about officer safety, this Court and others have granted the police extraordinary authority to control the movements of passengers during traffic stops. For example, every federal court of appeals that has addressed the issue has held that officers may order passengers to remain seated in the car during a stop. Given the potentially volatile nature of traffic stops, a reasonable passenger would not feel free to walk away until, at a minimum, the officer has approached the car and given the passenger some basis for concluding that he may leave.

In addition, a typical passenger has no way of knowing until he has made contact with the officer that a traffic stop relates solely to the driver's conduct, because police commonly and lawfully stop cars for reasons relating to passengers. That uncertainty is particularly pronounced in a case like this one, where an officer has pulled a car over because he *mistakenly* believes the driver has committed a traffic offense. In such cases, the passenger will have no reason to think that the *driver* has given the officer any reason to stop the car, and he thus cannot know whether he would be thwarting the very purpose of the traffic stop if he stepped out of the car and walked away.

b. Even after an officer indicates that a passenger is formally free to leave, the passenger should still be deemed "seized" if the surroundings make it unsafe or infeasible for the passenger to walk away. The California Supreme Court concluded otherwise only because it mistakenly analogized this case to those in which this Court has held that officers do not "seize" a passenger when they ask him questions on a bus during a scheduled stop, even if the passenger would find it inconvenient to leave the bus. This Court based that holding, however, on the twin assumptions that the bus passenger could have refused to answer the officers' questions and that, if he had done so, their presence on the bus would not have affected him in any respect.

Here, in contrast, the officer did not approach the car while it was stopped anyway; rather, he forced it to the side of the road against the wishes of the driver and passenger. Then, having unlawfully detained the car and its occupants, he immediately recognized petitioner and launched the inquiry that led to petitioner's arrest on drug charges. Unlike the bus passengers, petitioner was subject to a classic (and wrongful) seizure that led directly to the discovery of the evidence used against him in his subsequent prosecution.

ARGUMENT

I. A TRAFFIC STOP INHERENTLY SUBJECTS A PASSENGER TO A SEIZURE BY INTERFERING WITH HIS FREEDOM OF MOVEMENT

Law enforcement officers effect a "'seizure' of a person within the meaning of the Fourth Amendment" when they intentionally cause any "meaningful interference, however brief, with an individual's freedom of movement." *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (collecting cases). Although "a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police" is a seizure. *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980); *see also Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").

Under that long-established formulation, a traffic stop necessarily produces at least a momentary "seizure" of the car and everyone in it. When the police order a car to pull over, they "interfere" with the "movement" of driver and passenger alike, both of whom would otherwise continue traveling towards their mutually agreed-upon destination. Here, for example, when the officer forced Ms. Simeroth to stop, he necessarily diverted petitioner from his intended course and located him in a place not of his choosing at the side of a dark road. That restriction on petitioner's "freedom of movement" may persist throughout a traffic stop, as discussed in Part II below, but it is inevitable and unavoidable during the period in which the detained car is still coming to a stop, because a passenger obviously cannot "walk away"

from the scene at that point except by flinging himself from a still-moving car onto the pavement.

This Court was thus stating the obvious when it explained in *Berkemer* v. *McCarty* that "a traffic stop significantly curtails the 'freedom of action' of the driver *and the passengers*, if any, of the detained vehicle" and "'constitute[s] a "seizure" within the meaning of [the Fourth] Amendmen[t].'" 468 U.S. 420, 436-437 (1984) (emphasis added) (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979)); *see also Whren* v. *United States*, 517 U.S. 806, 809-10 (1996) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision."); *Colorado* v. *Bannister*, 449 U.S. 1, 4 n.3 (1980) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment.").[2] More generally, when the police "seize" any object, they logically seize its contents as well.[3] Of course, the mere fact that the passenger is "seized" in this sense does not mean that the police violate the Fourth

---

[2] *See also United States* v. *Hensley*, 469 U.S. 221, 226 (1985) (noting that "stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment"). The federal courts of appeals have also recognized that a passenger in a vehicle is seized when police stop that vehicle. *See, e.g.*, *United States* v. *Mosley*, 454 F.3d 249, 253 & n.6 (3d Cir. 2006); *United States* v. *Grant*, 349 F.3d 192, 196 (5th Cir. 2003); *United States* v. *Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States* v. *Gama-Bastidas*, 142 F.3d 1233, 1239 (10th Cir. 1998); *United States* v. *Kimball*, 25 F.3d 1, 5 (1st Cir. 1994).

[3] *See, e.g.*, *Davis* v. *Gracey*, 111 F.3d 1472, 1480 (10th Cir. 1997) (noting that police incidentally seized electronic files stored on a computer, even though the contents of the computer were not targeted by police and police had seized the computer only because it was an instrumentality of a crime); *cf. United States* v. *Place*, 462 U.S. 696, 715 (1983) (Brennan, J., concurring in the judgment) ("*Terry* stops may involve seizures of personal effects incidental to the seizure of the person involved. Obviously, an officer cannot seize a person without also seizing the personal effects that the individual has in his possession at the time.").

Amendment whenever they pull over a car without suspecting the passenger of complicity in the driver's traffic violation. Such a seizure will be lawful when (and only when) it is incidental to a *valid* traffic stop. *See Whren*, 517 U.S. at 810; *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (applying Fourth Amendment balancing test and concluding that it is reasonable for officers to order passengers to stand outside of car during any traffic stop).

The California Supreme Court sought to distinguish *Berkemer* on the ground that this Court's Fourth Amendment discussion in that case was not strictly essential to its Fifth Amendment holding (that traffic stops, while "seizures," are not "custodial interrogations" for *Miranda* purposes), 468 U.S. at 435-440. Pet. App. 42-43. Whether or not that is so, *Berkemer*'s Fourth Amendment discussion reflects the considered views of this Court, and it is obviously correct: when the police force a car to the side of the road, they do in fact "curtail[] the 'freedom of action'" of the driver and passengers alike, and they subject them all to a "seizure" for purposes of the Fourth Amendment. *See* 468 U.S. at 436-437.

The California Supreme Court also sought to justify its contrary conclusion on the theory that passengers do not usually view their own actions as the cause of a traffic stop and thus, for example, do not share the driver's "sinking feeling . . . upon seeing police lights in the rearview mirror" (Pet. App. 45 (internal quotation marks omitted)). But when the police successfully constrain a person's freedom of movement, his "feelings" are irrelevant: he is subject to a "seizure" whether or not he is subjectively worried that he is the focus of the police investigation. Indeed, the only context in which a private person's state of mind *could* matter to the question of whether the police have initiated a seizure of him is where the police have *not* physically constrained his movement—for example, when police simply strike up a conversation with him wherever he happens to be, such as in an airport, bus terminal, or other public place. In such cases, it is proper to ask whether a reasonable person would feel free to continue on his way or to ignore the police presence

altogether. *See generally Florida* v. *Royer*, 460 U.S. 491 (1983); *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

Here, petitioner's state of mind is irrelevant for the simple reason that the police *did* physically constrain his movement. For that reason alone, *Florida* v. *Bostick*, 501 U.S. 429 (1991), upon which the California Supreme Court relied, is inapposite. In *Bostick*, the Court held that an individual who is approached by an officer while sitting on a bus during a scheduled stop should generally be treated no differently, for Fourth Amendment purposes, from an individual sitting in a bus *station* while waiting for the bus to arrive. *See id.* at 431, 439-440; *see also United States* v. *Drayton*, 536 U.S. 194, 204 (2002) (same). The Court concluded that, in either case, a reasonable person generally would feel "at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (internal quotation marks omitted). In all such cases, however, the critical fact is that the police themselves have taken no steps that physically constrained the individual's freedom of movement. In a traffic stop, by contrast, the police obviously *do* impose such a constraint. For that reason, and those discussed in Part II below, the California Supreme Court's reliance on *Bostick* is untenable.

The California Supreme Court also misread *California* v. *Hodari D.*, 499 U.S. 621 (1991), for the curious proposition that petitioner could not have been "seized" because, "as the passenger, [he] had ~~no~~ *ability* to submit to the [officer's] show of authority" in ordering the traffic stop. Pet. App. 45 (emphasis added); *see id.* at 44-46. In *Hodari D.*, the defendant dropped inculpatory evidence while running away from police officers who had, to that point, failed in their efforts to detain him physically. He then moved to suppress the evidence on the theory that the police had already "seized" him at the time he discarded it. This Court held that "[t]he language of the Fourth Amendment . . . cannot sustain respondent's contention. The word 'seizure' . . . . does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee."

499 U.S. at 626. Instead, under the plain meaning of the word, a suspect can be "seized" either if he submits to official authority or, alternatively, if the police succeed in "actually bringing [him] within physical control." *Id.* at 624. That definition, however, plainly encompasses the status of a passenger in a successful traffic stop, in which the police bring a car and its occupants "within physical control," *id.*, by forcing them to pull over to the side of the road.

Finally, the California Supreme Court misconstrued this Court's statement in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), that "'a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement.'" Pet. App. 41 (quoting *Sacramento*, 523 U.S. at 844, in turn quoting *Brower* v. *County of Inyo*, 489 U.S. 593, 596-597 (1989)). In both *Sacramento* and *Brower*, where this quote first appeared, the Court was making the unexceptional point that the police do not "seize" an individual for Fourth Amendment purposes when they *unintentionally* constrain his movement, as through negligence—for example, "if a parked and unoccupied police car slips its brake and pins a passerby against a wall." *Brower*, 489 U.S. at 596. Indeed, the *Brower* Court was careful to add that, so long as "the detention or taking itself" is deliberate, "[a] seizure occurs even when *an unintended person* or thing is the object of the detention or taking." *Id.* (emphasis added). That, of course, is precisely what happens in a traffic stop: the police seize the car and its occupants "through means intentionally applied," even when the passengers are themselves "an unintended . . . object of the detention." *Id.* at 596-597 (emphasis omitted).

In sum, petitioner was seized *at least* through the point at which Ms. Simeroth's car came to a complete stop. That conclusion alone is enough to warrant the suppression of the subsequently discovered drug evidence.[4] Once the officer

---

[4] Because the California Supreme Court held that petitioner was subject to no seizure in the first place, it did not revisit the intermediate state court's determination that the drug evidence discovered during the

(unlawfully) seized petitioner by forcing the car to the side of the road for no legitimate reason, petitioner's illegal seizure became a direct and but-for cause of the discovery of the illegal drugs, thereby triggering the exclusionary rule.[5] Of course, petitioner's case for excluding this evidence is even more straightforward if, as we argue below, the Court further finds that the unlawful seizure persisted throughout this traffic stop.

II. A PASSENGER IN A TRAFFIC STOP REMAINS "SEIZED" UNTIL HE HAS RECEIVED SOME OBJECTIVE INDICATION THAT HE IS FREE TO LEAVE AND IT IS SAFE FOR HIM TO DO SO

If the Court agrees that a traffic stop results in the "seizure" of a car's passengers, it should give further guidance on how long that seizure persists during the typical stop—a question that may well have significance for exclusionary-rule purposes in a variety of contexts. There are two components to this question. First, in general, a reasonable passenger will not consider himself free to leave a car that has been pulled over by the police until, at the earliest, the de-

---

traffic stop was the inadmissible fruit of an unlawful seizure. *See* Pet. App. 34, 52. On its face, the question on which this Court granted certiorari addresses only the substantive Fourth Amendment question, not whether any subsequently obtained evidence should be suppressed under the exclusionary rule. *See* Pet. i. Nonetheless, because respondent's brief in opposition to certiorari focused entirely on the exclusionary rule rather than the substantive Fourth Amendment question, we briefly address that dimension of the case here. We refer the Court to petitioner's briefs for a more detailed treatment of this fact-specific set of issues.

[5] *See, e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 485-488 (1963); *Mosley*, 454 F.3d at 254, 256; *United States* v. *Johns*, 891 F.2d 243, 244-245 (9th Cir. 1989); *see generally* Pet. Reply 3-7. Of course, this would be an entirely different case if the traffic stop were *lawful*, the passenger sought to challenge only the fruits of an assertedly unlawful *search* of the car, and the passenger lacked any ownership interest in the things searched. *See generally Rakas* v. *Illinois*, 439 U.S. 128 (1978). Here, petitioner's exclusionary-rule claim has merit because he traces the discovery of the evidence to an illegal seizure of his person, rather than an illegal search of someone else's car.

taining officer has approached the car, assessed the situation, and given some indication that the passenger may leave. Second, even then, the passenger cannot be deemed free to leave the scene unless it is safe and feasible for him to do so. We address each of these conditions in turn.

A. A Passenger Remains Seized If He Has Received No Indication That He Is Free To Leave

1. This Court and others have conferred extraordinary discretion on police officers to control the movements of a stopped car's occupants in order to protect the safety of officers and passengers alike. As this Court has recognized, traffic stops pose unique dangers to officers: an officer typically pulls a car over without knowing who or what is inside and must approach the car carefully to avoid the surprise of a sudden attack. For that reason, this Court held in *Maryland* v. *Wilson* that police officers have bright-line authority to order any passenger out of a car during a traffic stop. 519 U.S. at 410, 414-415. The Court reasoned that the "interest in officer safety" outweighs the liberty interests of those passengers who wish to remain seated because, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle," and "the additional intrusion on the passenger is minimal." *Id.* at 413-415.

Indeed, police organizations have strongly advocated giving officers broad authority to control the movements of passengers during traffic stops, noting that such stops result in more officer fatalities than almost any other law enforcement context.[6] Thus, for safety-related reasons, some police

---

[6] *See, e.g.*, Nat'l Ass'n of Police Orgs., Inc. Amicus Br. in Support of Pet. 4-6, *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (No. 95-1268), 1996 WL 435918 (noting that from 1977 through the end of 1995, 445 officers were killed while performing traffic enforcement tasks, and that—depending on the time period—between 12.5 and 19.2 percent of officer deaths have occurred during traffic stops); *see also* Criminal Justice Legal Found. Amicus Br. in Support of Pet. 1, *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (No. 95-1268), 1996 WL 439106 (noting that traffic stops are "great sources of police deaths" and that "[e]ach stop carries the potential for

organizations have advocated a bright-line rule authorizing officers to detain passengers and control their movements during all traffic stops.[7]

Many courts have heeded that call. Citing basic concerns for officer safety, every federal court of appeals that has addressed the issue has held that police officers may order passengers to *stay in the car* during a traffic stop.[8] As one court of appeals has explained, "[a]llowing a passenger ... to wander freely about while a lone officer conducts a traffic stop presents a dangerous situation by splitting the officer's attention between two or more individuals, and enabling the driver and/or the passenger(s) to take advantage of a distracted officer." *United States* v. *Williams*, 419 F.3d 1029, 1034 (9th Cir.), *cert. denied*, 126 S. Ct. 840 (2005).

Of course, different police departments will adopt different approaches to the control of traffic stops: some may always order passengers out of the car, as *Maryland* v. *Wil-*

---

tragedy as the officer encounters the occupants of the vehicle.... [T]here is no simple way of readily separating the potentially violent from the routine.").

[7] *See, e.g.*, Am. For Effective Law Enforcement et al. Amicus Br. in Support of Pet. 4-10, *Maryland* v. *Wilson*, 519 U.S. 408 (1997) (No. 95-1268), 1996 WL 422145 (arguing for "a 'bright-line' rule that when a law enforcement officer makes a lawful traffic stop, the officer has an absolute right to control both the driver and passengers by requiring them to either remain inside the vehicle or exit and remain in the immediate vicinity during the stop" (capitalization altered)).

[8] *See United States* v. *Williams*, 419 F.3d 1029, 1034 (9th Cir.), *cert. denied*, 126 S. Ct. 840 (2005); *United States* v. *Clark*, 337 F.3d 1282, 1282-1283 (11th Cir. 2003); *Rogala* v. *District of Columbia*, 161 F.3d 44, 53 (D.C. Cir. 1998); *United States* v. *Moorefield*, 111 F.3d 10, 11, 13 (3d Cir. 1997). State courts have reached a more complex mix of outcomes. *Compare State* v. *Hodges*, 631 N.W.2d 206, 210-211 (S.D. 2001) (police officers may prevent a passenger from walking away from a legally stopped vehicle even when "'no special danger to the police is suggested'" (quoting *Wilson*, 519 U.S. at 415)), *with Wilson* v. *State*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) (police may not detain a passenger who attempts to leave the scene of a vehicle stop unless they "have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer, himself, or others").

son permits; some may always order passengers to remain in the car; and some may leave the disposition of passengers to the discretion of individual officers. Our central point here, however, is that the courts have given officers who conduct traffic stops enormous authority to limit the freedom of passengers during such stops. And given the variable procedures that different police jurisdictions use in dealing with passengers, the prudent passenger would sit still during a typical traffic stop until instructed to do otherwise.

In short, a reasonable passenger would not feel free to leave a car that has just been pulled over until, at a minimum, the officer has approached the car, assessed the situation, and given the passenger some basis for concluding that he may leave without interfering with the officer's routine. That is particularly true of traffic stops that, like this one, occur late at night, where poor visibility could make both the officer and the car's occupants more volatile in the face of unexpected developments than they might be on a well-traveled street during the daytime. The danger is as much to the passenger as to the officer. A passenger in the early stages of a traffic stop might rightly fear for his own safety if he tries to leave the car prematurely, because an officer may well react with a show of force to any unexpected movement by a passenger while the officer is approaching the car. Under the circumstances, the police and passengers alike are entitled to expect that passengers will stay in the car until after an officer has communicated with the occupants. And for the same reasons, the passengers remain "seized" in these circumstances.

2. In any event, when an officer pulls a car over, a passenger has no way of knowing whether the stop has something to do with his or her presence in the vehicle. The passenger's ignorance necessarily continues at least until the officer has explained the reason for the stop. The California Supreme Court's contrary assumption—that the driver and passenger alike know from the outset that a traffic stop relates only to the driver (Pet. App. 45-46)—is wrong.

Although most traffic stops are occasioned by the driver's breach of the traffic laws, many are prompted by suspicions about the passengers. For example, the police pull over cars because a passenger does not appear to be wearing a seatbelt, because the passengers are suspected to be illegal aliens, because a passenger is observed throwing litter from the car, because a passenger is seen carrying what might be an open liquor bottle, or because the police believe they recognize the passenger as a fugitive or the subject of outstanding warrants.[9] At least until the officer has approached the car and explained why he pulled it over, a passenger cannot know for certain whether he would be thwarting the very purpose of the traffic stop if he were to step out of the car and walk away.

That point is true as a general matter, but it is particularly true of the category of cases at issue here: cases in which an officer pulls a car over because he believes that the driver committed a traffic offense *but is mistaken*. In such cases, the driver and passenger alike are likely to be puzzled about the reason for the stop because the driver will have committed no traffic infraction. And a reasonable passenger in that situation would thus be particularly hesitant to leave the car before receiving some assurance that the traffic stop has nothing to do with him.

---

[9] *See, e.g.*, *United States* v. *Rodriguez-Diaz*, 161 F. Supp. 2d 627, 629 & n.1 (D. Md. 2001) (passenger's failure to wear seat belt was grounds for traffic stop); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 874-875 (1975) (agents stopped car on suspicion that the occupants were illegal aliens); *People* v. *Roth*, 85 P.3d 571, 573 (Colo. Ct. App. 2003) (police stopped car after observing passenger commit littering violation); *United States* v. *Lopez*, 710 F.2d 1071, 1072-1073 (5th Cir. 1983) (officers stopped car to determine whether one of the passengers was a federal fugitive). In this case, however, the officer does not claim that he recognized petitioner before pulling the car over.

B. A Passenger Remains Seized If He Cannot Prudently Leave The Site Of The Traffic Stop

Even if the police formally indicate that a passenger is free to leave, the passenger should be deemed to remain "seized" throughout the duration of a traffic stop if his surroundings—the stretch of road where the police have stopped the car against the occupants' will—make it unsafe or infeasible for him to walk away. For example, when a police officer pulls a car to the side of a busy interstate highway, it would be exceptionally dangerous for the passenger to begin walking down the shoulder of the highway in search of an exit ramp. Indeed, precisely because of the grim fatality rate for pedestrians on interstate highways, the great majority of states have enacted laws explicitly forbidding pedestrian traffic on such highways.[10] Petitioner and the driver were not on an interstate highway, but their situation was little better: they were pulled off to the side of a dark road in the middle of the night.

The California Supreme Court nonetheless concluded that a car passenger's practical inability to walk away from a traffic stop is no more significant from a Fourth Amendment perspective than the inconvenience the bus passengers would have faced in *Bostick* and *Drayton* if they had chosen to leave their respective buses when approached by police officers. Pet. App. 46-47. But those cases are quite beside the point because, as discussed in Part I, the police there did nothing to physically constrain anyone's movement and triggered no "seizure" in the first place. Here, by contrast, po-

---

[10] *See* AAA Foundation for Traffic Safety, *Report Summary—Pedestrian Fatalities on Interstate Highways: Characteristics and Countermeasures* (1997), *available at* http://www.aaafoundation.org/pdf/fatalped.pdf (last visited Mar. 4, 2007) (noting that ten percent of the country's pedestrian fatalities occur on Interstate highways, even though the Interstate system constitutes only about one percent of the country's total road mileage). *See, e.g.*, Ohio Rev. Code Ann. § 4511.051 (prohibiting pedestrians from using the right-of-way of freeways in most circumstances); N.Y. Veh. & Traf. Law § 1229-a (same, with respect to state expressways and interstate highways).

lice illegally compelled petitioner and Ms. Simeroth to alter their intended course and stop on the side of the road at 1:40 in the morning.

In *Bostick*, the police boarded a bus during a scheduled stop and began asking questions of a particular passenger—Bostick—who aroused an inarticulable suspicion. The Court found that Bostick was not unlawfully "seized," however, if a reasonable person in his position would have "fe[lt] free to decline the officer's requests or otherwise terminate the encounter." 501 U.S. at 436. Although the Court did not ultimately decide that issue—it remanded for further factual development—it suggested that Bostick could have disregarded the officers altogether, and that if he had done so, their presence would not even have affected the course of his day. *Id.* at 437. Likewise, in *Drayton*, 536 U.S. 194, the Court found no seizure where, with the consent of the bus driver, the police officers boarded a bus during a scheduled stop and began interrogating selected passengers. The Court reasoned that "the officers gave the passengers no reason to believe that they were required to answer the officers' questions"; that "[i]t is beyond question that had this encounter occurred on the street, it would be constitutional"; and that "[t]he fact that an encounter takes place on a bus does not of its own transform standard police questioning of citizens into an illegal seizure." *Id.* at 203-204; *see also INS* v. *Delgado*, 466 U.S. 210, 218-221 (1984) (finding no seizure of workers who were free not to answer questions posed to them by federal immigration agents at their work site).

This case is quite different. The police did not approach Ms. Simeroth's car while it was stopped anyway and look inside at her invitation. Instead, the officer activated his rooftop lights and forced the car to pull over to the side of the road against the wishes of the driver and the passenger alike. And this stop was not only uninvited, but unlawful: Ms. Simeroth had done nothing wrong, and the officer had no justification for pulling her car over. Having unlawfully stopped the vehicle, the officer then peered inside and recognized petitioner. All subsequent evidence introduced

against petitioner was the fruit of observations gained during the first moments of this unlawful stop.

In short, petitioner—quite unlike the defendants in *Bostick* and *Drayton*—never had the option of ignoring the police presence and continuing uninterrupted to his destination. The police physically constrained petitioner's movements by forcing the car in which he was riding to the side of the road; approached that car without anyone's consent and with no lawful rationale; and from there pursued an inquiry that, without any voluntary cooperation from petitioner, inevitably led to the accumulation of drug evidence against him. That evidence should be suppressed as the fruit of this unlawful seizure.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted.

PAMELA HARRIS
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
10th Floor
Washington, DC 20006
(202) 383-5386

FRANCES H. PRATT
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
1650 King Street
Alexandria, VA 22314
(703) 600-0815

JONATHAN E. NUECHTERLEIN
Counsel of Record
SAMBHAV SANKAR
HEATHER ZACHARY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARCH 5, 2007

51 17pgs 612

Supreme Court, U.S.
FILED
APR 3 - 2007
OFFICE OF THE CLERK

(4)

No. 06-8120

In the Supreme Court of the United States

BRUCE EDWARD BRENDLIN, PETITIONER,

v.

STATE OF CALIFORNIA, RESPONDENT.

On Writ of Certiorari
to the California Supreme Court

BRIEF FOR WAYNE COUNTY, MICHIGAN IN SUPPORT OF RESPONDENT

Kym L. Worthy
Prosecuting Attorney

*Timothy A. Baughman**
Chief, Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792
*Counsel of Record
Attorneys for Amici Curiae

Statement of Questions Presented for Review

I.

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop; further, even if the passenger *is* detained, whether the arrest and search incident arrest of the passenger results from an exploitation of that "illegality" where the passenger is arrested or an outstanding arrest warrant.

Table of Contents

Page

Statement of Questions Presented for Review ..... -i-

Index of Authorities..... -ii-

Interest of the Amicus ..... -v-

Statement of the Case ..... -1-

Argument ..... -2-

A. Introduction ..... -2-

B. Even Where an Improper Vehicle Stop Occurs, Where an Occupant Is Arrested on the Basis of a Valid Outstanding Warrant There Has Been No Exploitation of the "Primary Illegality," and the Arrest and Search Incident to Arrest Are Valid. ..... -3-

C. Conclusion ..... -10-

Relief ..... -11-

TABLE OF AUTHORITIES

Federal Cases

Brower v. County of Inyo,
489 U.S. 593, 109 S. Ct. 1378,
103 L. Ed. 2d 608 (1989) 2

Hudson v Michigan, __US__,
126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)..... 3, 4

Johnson v Louisiana,
406 U.S. 356, 32 L. Ed. 2d 152,
92 S. Ct. 1620 (1972) 6

Stone v Powell,
428 U.S. 465, 96 S. Ct. 3037,
49 L. Ed. 2d 1067 (1976) 3

United States v Calandra,
414 U.S. 338, 94 S. Ct. 613,
38 L. Ed. 2d 561 (1974).....3

United States v Ceccolini,
435 U.S. 268, 55 L. Ed. 2d 268,
98 S. Ct. 1054 (1978) 6

United States v Leon,
468 U.S. 1032, 104 S. Ct. 3479,
82 L. Ed. 2d 778 (1984) 3

Wong Sun v United States,
371 U.S. 471, 83 S. Ct. 407,
9 L. Ed. 2d 441 (1963).....4, 5, 6

State Cases

Brooks v State,
830 S.W.2d 817 (Texas App, 1992) 9

People v. Brendlin,
38 Cal. 4th 1107, 136 P.3d 845 (Cal, 2006) 2

People v Lambert,
174 Mich. App. 610,
436 N.W.2d 699 (1989)..... 7, 8, 9

Reed v State,
809 S.W.2d 940 (Texas App, 1991) 10

State v Hill,
725 So. 2d 1282 (La, 1998) 9

State v Marin,
806 So. 2d 894 (La App, 2002) 9

Other Authority

6 LaFave, *Search and Seizure* (3rd Ed.), §11.4.....4

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as the issue involved here has arisen a number of times in Wayne County cases.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

Statement of The Case

Amicus joins the statement of case of the State of California, Respondent.

Argument

A. Introduction

Petitioner was a passenger in an automobile. That automobile had a temporary registration affixed to the rear window. Because the officer could not make out the date of expiration on the temporary permit, he pulled the vehicle over. He recognized defendant as a parole absconder—there was a "no bail" arrest warrant out for petitioner—and petitioner was arrested. A search of his person revealed an orange syringe cap; paraphernalia and narcotics were found on the person of the driver, materials used in manufacturing methamphetamine were found in the back seat. Reversing the California Court of Appeals, the California Supreme Court held that the traffic stop of the vehicle accomplished by the police, directed as it was to the driver of the vehicle, did not constitute a Fourth Amendment seizure of the person of petitioner, who had, at the time of the stop, neither the ability to acquiesce to or resist the show of authority of the police. But until the police direct a show of authority specifically to the passenger, such as by directing that he or she alight from the vehicle, no seizure of the passenger has occurred.[1]

Much has been written regarding the seizure question, and amicus will not belabor the point. This Court has said that the very definition of a "seizure" "requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking. ... but the detention or taking itself must be willful."[2] In circumstances such as those in the present case, the passenger of the auto is not the "object of the detention or taking," and his or her seizure is not intentional—it is the

---

1. *People v. Brendlin* 38 Cal.4th 1107, 1122, 136 P.3d 845 (Cal. 2006).

2. *Brower v. County of Inyo.* 489 U.S. 593, *96, 109 S.Ct. 1378, 1381, 103 L Ed 2d 608 (1989).

driver to whom the show of authority is directed—but *incidental*. The California Supreme Court is correct—until a show of authority is directed to the passenger, to which he or she acquiesces, no Fourth Amendment seizure of the passenger has occurred. But what if a seizure *is* said to occur, where there also exists an outstanding arrest warrant for the seizure of the person of the passenger? Can that person be heard to complain?

B. Even Where an Improper Vehicle Stop Occurs, Where an Occupant Is Arrested on the Basis of a Valid Outstanding Warrant There Has Been No Exploitation of the "Primary Illegality," and the Arrest and Search Incident to Arrest Are Valid.

It is now clear beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, rather the rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[3] The purpose of the rule, then, is not to repair, but to deter. It carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and is thus not to be applied "unthinkingly."

That "but for" causation is a *necessary* ***but not sufficient*** element of a claim that evidence should be excluded as a result of a constitutional violation by the police is readily apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth

---

3. See e.g. *United States* v *Calandra*, 414 US 338, 94 S Ct 613, 38 L Ed 2d 561 (1974). See also *Stone* v *Powell*, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976); *United States* v *Leon*, 468 US 1032, 104 S Ct 3479, 82 L Ed 2d 778 (1984); *Hudson* v *Michigan*, __US__, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006).

Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation."[4] But absent a causal connection between the improper police conduct and the evidence or contraband discovered, the exclusionary rule has no place.[5] Further in some situations, *despite* "but for" causation the rule is not applied because its cost is too high when weighed against its benefits. One of the circumstances where exclusion will not result even if, in some sense, "but/for" causation is shown, is that of "purged taint," also known as attenuation; that is, where the evidence is not come at by exploitation of the "primary illegality."

This doctrine came to full flower in *Wong Sun* v *United States*.[6] Essentially, an informant who was a "first time" informant with no record of reliability, told federal agents that he had purchased heroin the night before from an individual known to him only as "Blackie Toy," who was the proprietor of a laundry on a particular thirty block street. The agents went to the laundry without an arrest or search warrant, and when Toy answered the door an agent said he had come for his laundry. When Toy began to close the door, the agent identified himself, and Toy slammed the door and ran. The agents broke open the door and arrested Toy in his bedroom, and he gave information leading to another person, who gave up tubes of heroin. Toy also led the agents to the living quarters of Wong Sun, who was arrested and ultimately made incriminating statements. Before this Court were the admissibility of Toy's admissions in his bedroom, the admissibility of the heroin turned over by the third party who

---

4. 6 LaFave, *Search and Seizure* (3rd Ed.), §11.4

5. See *Hudson v Michigan, supra.*

6. *Wong Sun* v *United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

was discovered through Toy's admissions, the admissibility of Wong Sun's confession which was made several days after his arrest and release on recognizance; and the admissibility of the heroin turned over by the third party against Wong Sun.

The majority found that the agents lacked probable cause for the arrest of Toy, arising either from the information given them by the informant, or in combination with Toy's response to their presence at the laundry. Because the arrest without probable cause was unlawful, so was the entry to achieve it. The statements of Toy were excludable as the fruit of the illegal arrest, held the Court, as under the circumstances they were not the result of an intervening act of free will. The statements led the agents to a third party, Yee, who turned over heroin, and it was clear that the heroin would not have been obtained from Yee absent Toy's statements. The Court stated that the test for exclusion is *not* whether "but for" the improper conduct the challenged evidence would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality...."[7] The heroin turned over by Yee met that test, and was thus inadmissible. Wong Sun's arrest was also held to be without probable cause by the lower court, but the Court found no reason to address that question, because "no evidentiary consequences" turned upon it. Wong Sun's confession was not the fruit of his arrest, in that he gave it voluntarily several days after he had been arraigned and released on his own recognizance. The Court thus found that the "connection between the arrest and the statement had 'become so attenuated as to dissipate the taint,'" though clearly in a "but for" sense it was the fruit of the illegal arrest. Plainly, then, the Court rejected the "but for" test. Though the heroin surrendered by Yee was inadmissible against Toy because the result of Toy's improperly gained statements, this result did not obtain with respect to Wong Sun, as he had no standing to claim it.

---

7. *Wong Sun*, at 455.

Wong Sun teaches that evidence which is discovered as the result of improper police conduct is not necessarily excludable, for the exclusionary rule is not to be applied on a strict "but for" or "cause and effect" basis. The "fruit of the poisonous tree" must be excluded—there must be a "but for" causation demonstrated—but it is not true that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police, the question instead being in each case whether the evidence gained was "come at by *exploitation of the primary illegality*." Where the causal connection is attenuated, or the "taint" somehow "purged," exclusion will not result.

Johnson v *Louisiana*[8] is also particularly instructive. The defendant claimed that his arrest in the nighttime without warrant was invalid without some showing of exigent circumstances. The Supreme Court, however, declined to discuss whether the arrest was illegal, because even assuming that it was no exclusionary remedy would result. The defendant sought to have his lineup identification excluded as a fruit of the arrest. But the Court found that the lineup identification was not a fruit of the arrest under *Wong Sun*. Certainly "but for" the arrest the lineup would not have occurred; however, before the lineup he was *arraigned*, and bail set. At the time of the lineup, then, his custody was not pursuant to the arrest, but to the *commitment of the arraigning magistrate*. Under these circumstances, held the Court, it could not be said that the lineup was the result of "exploitation" of the challenged arrest, but rather resulted from "means sufficiently distinguishable to be purged of the primary taint." This is very similar to the present case, where the search of the auto occurred not incident the stop of the defendant, but incident his valid arrest on an outstanding warrant.

---

8. *Johnson* v *Louisiana*, 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620 (1972). See also *United States* v *Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054 (1978).

Application of this principle to the present circumstances reveals that *even if* petitioner is said to be "seized" at the moment the driver of the vehicle acquiesced to the show of authority of the police, the seizure of his person and the search incident that seizure are not the result of any "exploitation" of that "primary illegality," but the result of his valid arrest on an outstanding warrant. It must be remembered that petitioner was illegally *at large* at the time of his seizure, his seizure being justified not only by probable cause, but by a warrant issued by a magistrate.

Demonstrating the point is *People v Lambert*.[9] Sheriff's deputies responded to a silent alarm from a garage. They discovered that the garage had been broken into and that one or more all-terrain vehicles may have been removed. They left the scene and drove north, looking for evidence of the vehicles, and within a short time saw a van traveling south, which they determined to stop the van to see if the occupants had seen anyone in the area. When the deputies made a U-turn to proceed in the direction of the van to accomplish the stop, the van accelerated. A pursuit ensued, and the deputies activated their overhead lights and the van pulled over. Only after the van had been stopped did one of the deputies recognize the driver, whom he knew was the subject of outstanding warrants.

The defendant was arrested on the warrants, and while in the patrol car admitted that he had broken into the garage and that items stolen from the garage were in the back of the van. A deputy advised defendant of his Miranda rights, after which defendant again confessed, also giving the deputy permission to search the van. That search revealed fruits of the crime.

The Michigan Court of Appeals found that the stop of the van was not justified by reasonable suspicion or probable

---

9. *People* v *Lambert*, 174 Mich App 610, 436 N.W. 2d 699 (1989)

cause, and was thus unconstitutional. But, said the court, this was not the end of the matter:

> When a defendant claims that physical evidence should be suppressed as a result of an unlawful seizure of his person, the appropriate inquiry is whether that evidence was procured by an exploitation of the illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint....This is not a "but for" test, but rather depends on whether there has been an exploitation of the primary illegality.[10]

The court found that the evidence was admissible despite the initial impropriety of the police:

- Here, the unlawful stop produced defendant and his vehicle.

- However, the physical evidence obtained resulted from the fact that one of the deputies immediately recognized defendant as being the subject of outstanding bench warrants. Defendant's lawful arrest and all the evidence obtained resulted from that identification.

- Under the circumstances of this case, it was not reasonably foreseeable for the deputies to believe that they would be able to recognize the driver of the vehicle as being the subject of outstanding bench warrants at the time they made the stop.

- There was no exploitation of the primary illegality and, hence, the "fruit of the poisonous tree" doctrine was inapplicable.

---

10. *Lambert*. at 703.

- We conclude ... that where the police have unlawfully stopped or detained a citizen and then discover that the person detained is the proper subject of a lawful arrest on grounds other than the original illegal stop, the police may make the arrest *and any evidence obtained as a result of the lawful arrest is admissible*.[11]

Also informative is the Louisiana case of *State v Hill*.[12] The defendant was stopped on the street without reasonable suspicion. During his detention, a computer check revealed that he had two outstanding arrest warrants, and a search incident to his arrest under those warrants revealed that he was in possession of a crack pipe with cocaine residue. The Louisiana Supreme Court noted that no evidence was discovered as the result of the improper stop, but only the outstanding arrest warrants. The court found that the evidence seized was not suppressible, as the arrest on the warrants "constituted an intervening circumstance" and dissipated the taint of the "initial impermissible encounter."[13]

Similarly, in the Texas case of *Brooks v State*[14] the defendant was stopped without reasonable suspicion, and arrested when a computer check showed outstanding warrants. An examination of the VIN of his vehicle preparatory to its impoundment revealed that it was stolen. The court concluded that "even in a situation involving an

---

11. *Lambert*, at 703.

12. *State v Hill*, 725 So 2d 1282 (La, 1998).

13. *Hill*, at 1284-1285. See also *State v Marin*, 806 So 2d 894 (La App, 2002), reaching the same result on indistinguishable facts (an invalid stop, discovery of outstanding warrants through a computer check, an arrest and discovery of contraband incident that arrest).

14. *Brooks v State*, 830 SW2d 817 (Texas App, 1992).

illegal detention, where a valid warrant for the (defendant's) arrest is discovered, and the (defendant) is arrested under the authority of that warrant, evidence found during a subsequent inventory search pursuant to the arrest is admissible into evidence...."[15]

C. Conclusion

If an improper stop of the vehicle, followed by an arrest of the driver based on an outstanding warrant, results in a finding that the arrest is proper and any evidentiary fruits flow from the proper arrest and not the improper initial stop, no different rule should obtain for a passenger, even assuming for the sake of argument that the passenger may be viewed as "seized" when the driver pulls over. Petitioner here was at large in the community with a valid warrant for his arrest outstanding. The matter is akin almost to that of standing; that is, where the seizure of one's person is justified by warrant, one should not be heard to complain—the law should set its face against such a complaint—even if the police make an initial seizure unjustified by the law, for as an objective matter the seizure of the person was not only justified, but commanded by appropriate authority. Even if petitioner was initially improperly seized, he was then arrested based on an outstanding warrant, an intervening circumstance dissipating any taint from the initial improper stop. Unless exclusion is to occur on a but-for basis, the arrest of the petitioner and the search incident arrest were justified by the warrant, and suppression is inappropriate.

---

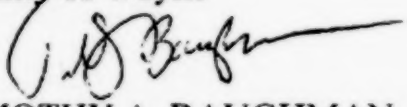
15. *Brooks*, at 821. So also in *Reed v State*, 809 SW2d 940 (Texas App, 1991), on indistinguishable facts.

Relief

Wherefore, amicus submits that the California Supreme Court should be affirmed.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792